TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 194.

JOHN W. PENCE, PLAINTIFF IN ERROR,

vs.

ROBERT B. LANGDON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED OCTOBER 6, 1876.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Minnesota, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Robert B. Langdon, plaintiff, and John W. Pence, defendant, a manifest error hath happened, to the great damage of the said defendant, as is said, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capital, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 12th day of August, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the one hundred and first.

[SEAL.] H. E. MANN,
Clerk of the Circuit Court of the United States of America for the District of Minnesota.

2 UNITED STATES OF AMERICA,
District of Minnesota, ss:

The answer of the judges of the circuit court of the United States for the district of Minnesota, in the eighth circuit, in within writ mentioned.

The record and proceedings whereof mention is within made, with all things concerning the same, are hereby respectfully certified to the justices of the Supreme Court of the United States of America, within mentioned, in a certain schedule to this writ annexed, as within it is commanded.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Saint Paul, in the district of Minnesota, this 23d day of September, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the one hundred and first year.

[SEAL.] H. E. MANN,
Clerk U. S. Circuit Court, Dist. of Minnesota.

(Indorsed:) Supreme Court United States. John W. Pence, plaintiff in error, vs. Robert B. Langdon, defendant in error.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Minnesota, greeting:

Because in the record and proceedings, as also in the rendition of the

udgment of a plea which is in the said circuit court, before you or some of you, between Robert B. Langdon, plaintiff, and John W. Pence, defendant, a manifest error hath happened, to the great damage of the said defendant, as is said, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capital, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 12th day of August, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the one hundred and first.

[SEAL.] H. E. MANN,
Clerk of the Circuit Court of the United States of America for the District of Minnesota.

4 (Indorsed:) United States Supreme Court. John W. Pence, plaintiff in error, vs. Robert B. Langdon, defendant in error. Copy of writ of error.

This copy of writ of error was this day lodged in my office by the plaintiff in error, for the defendant in error.
Aug. 12, 1876.

H. E. MANN, *Clerk.*

5 The United States of America to Robert B. Langdon, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, in the District of Columbia, on the second Monday of October, A. D. 1876, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Minnesota, wherein John W. Pence is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned shall not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Rensselaer R. Nelson, a judge of said court for said district, this 12th day of August, A. D. 1876.

R. R. NELSON,
Judge.

6 (Indorsed:) United States Supreme Court. John W. Pence, pl'ff in error, vs. Robert R. Langdon, defendant in error. Citation. Filed August 18, 1876. H. E. Mann, clerk.

Service admitted this 14th day of August, A. D. 1876.
LOCHREN, McNAIR & GILFILLAN,
Att'ys for Def't in Error.
R. B. LANGDON, *Def't in Error.*

7 *Register entry*, 5789.

District court, fourth judicial district.

STATE OF MINNESOTA,
County of Hennepin, ss:

Lochren, McNair and Gilfillan.

ROBERT B. LANGDON
vs.
JOHN W. PENCE.

Shaw and Levi.

D'ft	Pl'ff	
20″	20″	August 16th, 1875. Plaintiff appeared, by his attor-
10″	30″	neys, and filed complaint, affidavit, and bond for attach-
30″	100″	ment, whereupon a writ of attachment issued to Henne-
	10″	pin Co.
	20″	

Sept. 28th, 1875. Summons filed and writ of attachment returned and filed.

November 16th, 1875. Defendant appeared, by attorneys, and filed petition and bond for removal to U. S. circuit court.

November 17th, 1875. Answer and order transfering cause to U. S. circuit court filed.

Summons.

District court, fourth judicial district.

STATE OF MINNESOTA,
County of Hennepin, ss:

ROBERT B. LANGDON
against
JOHN W. PENCE.

The State of Minnesota to the above-named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in the above-entitled action, which complaint has
8 been filed in the office of the clerk of this court, at the court-house, in the city of Minneapolis in the county of Hennepin and State of Minnesota, and to serve a copy of your answer to the said complaint on the subscribers, at their office, in the city of Minneapolis, in the county of Hennepin, in said State, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer said complaint within the time aforesaid, the plaintiff in this action will have the amount he is entitled to recover, ascertained by the court or under its direction, and take judgment for the amount so ascertained.

Dated August 14th, A. D. 1875.

LOCHREN, MCNAIR & GILFILLAN,
Plaintiff's Attorneys.

(Endorsed:) No. 578. District court, fourth judicial district, county of Hennepin. Robert B. Langdon against John W. Pence. Summons. Lochren, McNair and Gilfillan, pl'ff's att'ys, Minneapolis, Minn. Filed September 28th, 1875. D. W. Albaugh, clerk, by W. Freshour, deputy.

District court, fourth judicial district.

STATE OF MINNESOTA,
County of Hennepin :

ROBERT B. LANGDON
against
JOHN W. PENCE.

The plaintiff above named complains against the above-named defendant, and respectfully shows to this court:

That on the 17th day of December, A. D. 1874, this plaintiff, then residing and being at Minneapolis, in the county of Hennepin and State of Minnesota, and the above-named defendant, then being in San Francisco, in the State of California, and engaged in mining for gold in the States of California and Nevada, the said defendant by letter represented to this plaintiff that he was part owner in a certain gold mine in the State of Nevada of very great value, and from which large profits would certainly be realized, and that there was at that time for sale one-eighth of said mine, consisting of seven thousand five hundred shares, which could be bought for eight thousand three hundred and sixty-eight dollars and seventy-five cents in gold, encumbered with an obligation to pay the further sum of three thousand one hundred and twenty-five dollars out of the first nett proceeds from said mine, after the payment of about twenty thousand dollars of expenses in the improvement of such mine; and further represented to this plaintiff that experienced miners considered that the said mine would yield immense profits, and that there were several persons who were anxiously endeavoring to purchase the said seventy-five hundred shares of stock, but that the defendant had the option to purchase said shares at said price for the space of ten days, and the refusal thereof for that length of time, and then and there by said letter offered to act as the agent of this plaintiff in the purchase of said shares for this plaintiff, giving this plaintiff the benefit of the defendant's said option to purchase the said shares at the price and on the terms aforesaid, and directing this plaintiff, in case he should determine to accept such offer and to purchase such shares through the agency of said defendant, to notify said defendant by telegraph and to send the defendant the money in exchange on New York, adding the premium on gold, and further offering, that in case it was not convenient for plaintiff to send the whole of the money at once, if plaintiff would send one-half or more of such money and his note for the balance payable in sixty days in San Francisco aforesaid, with twelve per cent. interest in gold, that defendant would so arrange the matter for plaintiff that it would effectuate such purchase.

That the letter of said defendant containing said statements and representations was by said defendant sent by mail to this plaintiff, and was received by this plaintiff on or about the 24th day of December, A. D. 1874, at said Minneapolis.

That thereupon this plaintiff inquired by telegraph of said defendant whether in case this plaintiff should make such proposed purchase of such shares, the plaintiff and said Pence, with one Watson, whom defendant mentioned in said letter as having an interest in the same mine, would have a controlling interest in said mine, and that in answer thereto the

said defendant by telegraph stated and represented to this plaintiff that such purchase would give such controlling interest.

That thereupon this plaintiff, fully believing all of the said statements and representations of said defendant to be true, and not
11 knowing to the contrary, but relying thereon and fully believing therefrom that said defendant had no interest whatever in the said seventy-five hundred shares of stock in said mine, and that in such proposed purchase the defendant was acting and would act solely on behalf of this plaintiff and as plaintiff's agent, and that plaintiff had and would have therein the aid and benefit of the judgment, knowledge, and experience of the defendant, wholly unbiased by any personal interest of said defendant opposed to plaintiff's interest in the matter of such purchase, was thereby induced to make the purchase of said seventy-five hundred shares of stock in said mine by and through said defendant as his agent, and thereupon, on the 28th day of December, A. D. 1874, notified said defendant that he might purchase for this plaintiff the said seventy-five hundred shares of stock in the said mine, and that this plaintiff would at once forward to him the money to make such purchase, and that on the same day this plaintiff did purchase and forward to said defendant, at San Francisco aforesaid, a draft of the National Exchange Bank of Minneapolis upon the National Park Bank of New York for the sum of eight thousand three hundred and sixty-eight dollars and seventy-five cents in gold, payable at sight, and made payable to the order of the said defendant, and then and there forwarded the said draft to the said defendant at San Francisco aforesaid, to enable said defendant to buy for the said plaintiff the said seventy-five hundred shares of stock in said mine.

12 That this plaintiff paid for said draft the sum of nine thousand four hundred and twenty-five dollars and twenty-nine cents, and that said draft was worth said last-named sum at Minneapolis and at said San Francisco, and that the same was received by the said defendant on or before the 8th day of January, A. D. 1875, and that on said last-named date the said defendant notified this plaintiff by letter that he had purchased for plaintiff said seventy-five hundred shares of stock, and that the same was in the Owyhee Water and Gravel Mining Company, and had deposited said stock in the National Gold Bank and Trust Company of San Francisco aforesaid. And this plaintiff avers that each and every of the said statements and representations made by said defendant to this plaintiff were false and made with intent to cheat and defraud this plaintiff. That the said mine was of little or no value, and that the said shares of stock were not worth the sum of eight thousand three hundred and sixty-eight dollars and seventy-five cents, nor more than one fourth of said sum, and that no one was endeavoring to purchase said shares or any of them; that said defendant had not the option to purchase them for ten days, nor for any time at any price, and that said defendant did not act for nor in behalf of this plaintiff in or about the purchase of said shares. But on the contrary this plaintiff avers the fact to be, that on the 17th day of December, A. D. 1874, and for a long time before that date, the said defendant was himself the owner
13 of the same identical seventy-five hundred shares of stock, and that on the receipt of said draft, he kept the whole amount thereof himself and made a pretense of transferring said shares from himself to this plaintiff, and that all statements and representations aforesaid as to the value of said mine and of said stock and of the desire of others to purchase the same, and of such purchase giving to said persons a controlling interest in said mine, and as to his having an option for ten

days to purchase such shares, and as to his acting in respect to such purchase for and in the interest of this plaintiff, were falsely and fraudulently made by the said defendant with the intent and for the purpose of cheating and defrauding this plaintiff, and procuring from this plaintiff the said sum of eight thousand three hundred and sixty-eight dollars and seventy-five cents in gold; and plaintiff says further that had he known that said shares belonged to the said defendant, or that he had any interest whatever therein, or had he known that any of the said representations were untrue, this plaintiff would never have directed said defendant to purchase the said shares, nor any of them, nor have sent the said defendant the said draft or any of the money whatever, and that by means of said false representations and fraud of said defendant the said defendant fraudulently obtained the said draft from this plaintiff.

And this plaintiff further says that during all the times aforesaid David C. Shepard and Alonzo N. Linton were connected in busi-
14 ness with this plaintiff, and that they were pecuniarily interested with this plaintiff in the said purchase of said shares of stock and in the money sent to said defendant as aforesaid for the purchase of the same, but that the whole of the said business was transacted in the name of this plaintiff and as if he were the sole person interested therein.

And this plaintiff further says that no certificates or other evidences of ownership of said shares of stock have ever been delivered by said defendant nor received by this plaintiff, nor by said Shepard nor by said Linton.

Plaintiff says further that neither he nor said Shepard, nor said Linton ever had any knowledge or information that the said defendant was the owner of the said shares of stock, or was in any way interested therein, or had procured and kept said draft and the money represented thereby for his own use, or that any of said statements or representations were untrue, until on or about the 20th day of June, A. D. 1875, at Elcho County, in the State of Nevada, when this plaintiff and said Shepard and said Linton were informed for the first time that the said defendant had not purchased said shares of stock for this plaintiff, with the avails of said draft, but had kept the said draft and the proceeds thereof to his own use, and had since made pretended transfer of his own shares to this plaintiff. That this plaintiff and the said Shepard and the said Linton then and there notified the said defendant that they re'cinded said pretended purchase of said shares, and should
15 not be bound thereby, and demanded of said defendant that he pay back to them the amount of money paid for and which defendant realized from said draft, to wit, the sum of nine thousand four hundred and twenty-five dollars and twenty-nine cents.

And this plaintiff avers that on the 13th day of August, A. D. 1875, the said David C. Shepard and Alonzo N. Linton, for a valuable consideration to them paid therefor by this plaintiff, sold, assigned and transferred to this plaintiff, all their right, title, and interest in and to the said money so sent by the said draft to said defendant, and in every right of action existing against said defendant arising out of the said transactions, and that thereafter and before the commencement of this action this plaintiff again demanded of said defendant the said sum of nine thousand four hundred and twenty-five dollars and twenty-nine cents. But plaintiff avers that the said defendant has never repaid any part or portion of said money, but has ever refused and still refuses so to do.

Wherefore this plaintiff demands judgment against said defendant for the sum of nine thousand four hundred and twenty-five dollars and twenty-nine cents, with interest thereon since the twenty-eighth day of December, A. D. 1874, and the costs and disbursements of this action.

LOCHREN, McNAIR AND GILFILLAN,
Att'ys for Plaintiff.

HENNEPIN COUNTY, *ss:*

Robert B. Langdon, being duly sworn, says that he is the plaint-
16 iff in the above-entitled action, and has heard read the foregoing complaint and knows its contents, and that the same is true of his own knowledge, except as to the matters therein stated on his information and belief, and as to these matters that he believes it to be true.

R. B. LANGDON.

Subscribed and sworn to before me this 14th day of August, A. D. 1875.

[L. S.] WILLIAM LOCHREN,
Notary Public, Hennepin County, Minnesota.

(Endorsement:) District court, Hennepin County. Robert W. Langdon against John W. Pence, complainant. Lochren, McNair and Gilfillan, pl'ff's attorneys. Minneapolis, Minn. Filed August 16th, 1875. D. W. Albaugh, clerk, by W. Freshour, deputy clerk.

17 *Affidavit for attachment.*

District court, 4th judicial district.

STATE OF MINNESOTA,
County of Hennepin:

ROBERT B. LANGDON
against
JOHN W. PIERCE.

STATE OF MINNESOTA,
County of Hennepin, ss:

Robert B. Langdon came before me personally and, being first duly sworn, doth say that he is the plaintiff in the above entitled action, which is brought for the recovery of money, and a summons has been issued therein. That a cause of action exists against the defendant, and in favor of said plaintiff therein, and the amount of said plaintiff's claim therein is nine thousand four hundred and twenty-five and $\frac{29}{100}$ dollars, with interest since Dec. 28th, 1874, and the ground thereof is as follows, that is to say: that said defendant, by falsely and fraudulently representing to this plaintiff that some other person or persons had for sale seven thousand five hundred shares of stock in a gold mine in the State of Nevada, in which mine defendant was an owner, and that said mine was of great value, and certain to pay great profits, and that defendant had the refusal of said shares for ten days, at the price of $8,368.75 in gold, and would, if plaintiff would send him that amount, give the plaintiff the benefit of such option, and buy said shares for said plaintiff, and that several other persons were endeavoring to purchase said share', and by other representations, all of which were false

and fraudulent, and made with the purpose of cheating and defrauding this plaintiff, induced this plaintiff to purchase and to send to said defendant a draft on the National Park Bank, of New York, for $8,368.75, payable in gold, to the order of defendant, for which plaintiff paid the sum of nine thousand four hundred and twenty-five dollars and twenty-nine cents, and which was worth said last-named sum. That said defendant did not purchase said shares for this plaintiff, but kept the said money to his own use, and made a pretended transfer of his own shares to this plaintiff. That said mine and said shares were worthless, and known to be so by said defendant when he made such representations, and that this plaintiff did not discover that said representations were false until on or about the 20th day of June, A. D. 1875. That he at once notified said defendant that he would not be bound by such pretended purchase, and demanded from him the amount of money paid for said draft, as aforesaid, and that said defendant refused and still refuses to pay the same or any part thereof.

And said affiant doth depose and say that said plaintiff's said debt was fraudulently contracted by said defendant as aforesaid, and, further, that said defendant is not a resident of the State of Minnesota,
18 and prays that such writ of attachment may be allowed and issued against the property of said defendant therein, according to the statute in such case provided; and said affiant says that no previous application has been made therein for such order, and further saith not.

R. B. LANGDON.

Subscribed and sworn to before me on this 14th day of August, A. D. 1875.

WILLIAM LOCHREN,
Notary Public, Hennepin Co., Minnesota.

(Indorsed:) District court, 4th jud. district, county of Hennepin. Robert B. Langdon against John W. Pence. Affidavit for attachment.

To the clerk of said court:

On filing the within affidavit and a bond approved by me in the within entitled cause, let a writ of attachment issue as within prayed.

Dated August 16th, 1875.

C. E. VANDERBURGH,
Judge of said Court.

Filed August 16th, A. D. 1875.

D. W. ABAUGH,
Clerk of said Court,
By W. FRESHOUR,
Deputy.

LOCHREN, MCNAIR AND GILFILLAN,
Plaintiff's Attorneys.

19 *Bond for attachment.*

District court, fourth judicial district.

STATE OF MINNESOTA,
County of Hennepin, ss:

ROBERT B. LANGDON
against
JOHN W. PENCE.

Know all men by these presents that we, Robert B. Langdon, as pri-

cipal, and David C. Shepard and Anthony Kelly, as sureties, are held and firmly bound unto John W. Pence, the defendant above named, in the sum of two hundred and fifty dollars, to be paid to the said John W. Pence, his heirs, executor, administrators, or assigns, for the payment whereof, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this 14th day of August, A. D. 1875.

The condition of this obligation is such that, whereas the above named plaintiff has duly applied for a writ of attachment against the property of said defendant in this action, according to the statute in such case provided:

Now, therefore, if the said defendant recover judgment, if the plaintiff shall pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the penalty of this bond, then this obligation shall be void; otherwise of force.

In testimony whereof we have hereunto set our hands and seals on this fourteenth day of August, A. D. 1875.

R. B. LANGDON. [SEAL.]
D. C. SHEPARD. [SEAL.]
ANTHONY KELLY. [SEAL.]

Signed, sealed, and delivered in presence of—
W'M LOCHREN.

STATE OF MINNESOTA,
County of Hennepin, ss:

Be it known that on this fourteenth day of August, A. D. 1875, came before me personally Robert B. Langdon, David C. Shepard, and to me well known to be the same persons who executed the foregoing bond, and they severally acknowledged the same to be their own free act and deed.

WILLIAM LOCHREN,
Notary Public, Hennepin Co., Minne.

20 STATE OF MINNESOTA,
County of Hennepin, ss:

David C. Shepard and the sureties named in and who executed the foregoing bond came before me personally, and, being by me first duly sworn, doth say, each for himself, that he is the surety above named; that he is a resident and freeholder of and in this State of Minnesota, and worth the amount of five hundred dollars, specified in the foregoing bond, above his debts and liabilities, and exclusive of his property which is exempt from execution.

DAVID C. SHEPARD.
ANTHONY KELLEY.

Subscribed and sworn to before me on this fourteenth day of August, A. D. 1875.

WILLIAM LOCHREN,
Notary Public, Hennepin County, Minnesota.

(Indorsed:) 5789. District court, Hennepin County. Robert B. Langdon against John W. Pence. Bond for attachment.

I hereby approve the within bond and the sureties thereon.
Dated August 16th, A. D. 1876.

C. E. VANDERBURGH,
Judge.

LOCHREN, MCNAIR AND GILFILLAN,
Pl'ff' Att'ys.

Filed August 16th, 1875.

D. W. ALBAUGH, *Clerk.*
By W. FRESHOUR, *Dep'y Clerk.*

21 *Writ of attachment.*

District court, fourth judicial district.

STATE OF MINNESOTA,
County of Hennepin:

ROBERT B. LANGDON, PLAINTIFF,
against
JOHN W. PENCE, DEFENDANT.

STATE OF MINNESOTA,
Cunty of Hennepin, ss:

The State of Minnesota to the sheriff of the county of Hennepin:

Whereas, in the above-entitled action, an application has been made to the proper officer for a writ of attachment against the property of John W. Pence, defendant therein, setting forth by affidavit that a cause of action exists against such defendant and specifying the amount of the claim and the ground thereof, and that the defendant is not a resident of the State of Minnesota, and the plaintiff's debt was fraudulently contracted, and the bond required by law has been duly executed and filed, and said writ allowed and directed to issue by said officer:

Therefore you are hereby commanded and required to attach and safely keep all the property of said John W. Pence within your county not exempt from execution, or so much thereof as may be sufficient to satisfy the said plaintiff' demand, which amounts to the sum of nine thousand four hundred and twenty-five and $\frac{29}{100}$ dollars, and interest since December 28th, 1874, as appears by the complaint in said action, together with costs and expenses, and that you proceed herein in the manner required of you by law.

Witness the honorable Chas. E. Vanderburgh, judge of the district court aforesaid, at Minneapolis, this sixteenth day of August, in the year 1875.

[COURT SEAL.]

D. W. ALBAUGH, *Clerk,*
By W. FRESHOUR, *Deputy Clerk.*

22 (Indorsed:) 5789. District court, county of Hennepin. R. B. Langdon, plaintiff, against John W. Pence, defendant. Writ of attachment. Issued August 16th, 1875. D. W. Albaugh, clerk, by W. Freshour, deputy clerk. Returned and filed September 28th, 1875. D. W. Albaugh, clerk, by W. Freshour, deputy clerk. Lochren, McNair and Gilfillan.

23 STATE OF MINNESOTA,
County of Hennepin, ss:

I hereby certify and return that under and by virtue of the writ of

attachment hereto attached I have, this 17th day of August, 1875, levied upon and attached all right, title, and interest of John W. Pence, defendant named therein, in and to the following described real estate, situate in the county of Hennepin and State of Minnesota, viz: lot numbered four (4) in block numbered twenty-three (23) in Minneapolis, according to the plat of Minneapolis on file and of record in the office of the register of deeds of said Hennepin County; also that part of block numbered thirty-seven (37) in said Minneapolis which is described as follows: Commencing at the corner of said block thirty-seven (37) which is formed by the intersection of Second street and Hennepin avenue, thence along Second street to the corner of said block thirty-seven (37) which is formed by the intersection of Second street with Nicollet avenue, thence along the line of Nicollet avenue toward Washington avenue twenty-six (26) feet, thence across said block thirty-seven (37) on a line parallel with Second street and twenty-six (26) feet distant therefrom to Hennepin avenue, thence along Hennepin avenue to the place of beginning.

Dated this 17th day of August, 1875.

GEO. H. JOHNSON,
Sheriff of Hennepin County, Minn.,
By JAMES STODDART, *Deputy.*

24 District court, fourth judicial district.

STATE OF MINNESOTA,
County of Hennepin:

ROBERT B. LANGDON
against
JOHN W. PENCE.

The defendant above named, for answer to the complaint of the plaintiff herein, alleges that on or about the 22d day of July, A. D. 1874, the above-named defendant, together with one M. A. Baldwin, purchased and became the owners of thirty thousand shares of stock in the Owyhee Water and Gravel Mining Company, a corporation duly incorporated and doing business under the laws of the State of California, and owning certain placer mines and mining ground in Elko County, State of Nevada; that said shares of stock were sold and conveyed to said defendant and said Baldwin by a written contract of said above-mentioned date, with one P. N. Mayon, subject to certain encumbrances and conditions therein mentioned, and that said thirty thousand shares of stock constituted one-half of all the stock of said mining company, the whole number of shares of the stock of said company being sixty thousand shares, of fifty dollars each, and said thirty thousand shares being transferred in the following proportions, to wit: To the said defendant twenty-two thousand five hundred, and to the said M. A. Baldwin seven thousand five hundred shares; that subsequently, and on or about
25 the 27th day of November, 1874, said defendant bargained and sold to one John Watson seven thousand five hundred of the said shares of stock so as aforesaid purchased by him, said defendant, at the cost price thereof with interest at twelve per cent. per annum added, and subject proportionally to the same encumbrances and conditions in said first-mentioned writ'en contract mentioned, being encumbrances of like character with those mentioned in said complaint.

That afterwards, and on or about the 10th day of December, A. D.

1874, said plaintiff did, without any solicitation, inducement, or communication whatever of or from this defendant, write and send by mail from Minneapolis, Minnesota, to this defendant, at San Francisco, California, a letter inquiring of defendant what, if any, arrangements could be made whereby he, said plaintiff, could get any interest in said mining stock and business, which said letter was received by defendant at San Francisco on or about the 17th day of December, A. D. 1874; that a short time before the receipt by defendant of said last-mentioned letter, defendant had bargained and agreed to sell to one Hill Beechy seven thousand five hundred shares of his said remaining stock at and for the agreed price of $8,368.75 in gold coin or equivalent, subject proportionally to the same encumbrances above-mentioned, and to take and receive in payment therefor three thousand shares of stock in the Luna Mining Company at the price of one thousand dollars, and the balance in cash on delivery of bill of sale or transfer; that said sale of
26 stock to said Beechy not having been formally completed by the delivery of bill of sale or transfer, defendant did, immediately upon the receipt of said letter of Dec. 10th, 1874, from said plaintiff, and moved and induced solely thereby, inform said Beechy thereof, and that said plaintiff would perhaps like to purchase said 7,500 shares of stock so as aforesaid bargained to him, said Beechy, and requested said Beechy to give him, said defendant, the refusal for ten days to rescind said agreement with him, said Beechy, or take back said stock so as aforesaid bargained to him at same price he had agreed to pay, in order that he, said defendant, might, in case said plaintiff should desire to purchase, sell the same to said plaintiff, to which request said Beechy agreed, upon condition that if he did not get said 7,500 shares so as aforesaid to him bargained, then said defendant should take the said 3,000 shares of stock of the Luna Mining Company and pay him, said Beechy, therefor the sum of $1,000 in cash, to which condition said defendant agreed; that thereupon, on the 17th day of December, 1874, said defendant wrote and mailed from San Francisco, to said plaintiff, at said Minneapolis, a letter, being the same first mentioned in said complaint, which said letter, and the whole thereof, was in words and figures as follows, to wit:

OCCIDENTAL HOTEL,
San Francisco, Dec. 17th, 1874.

R. B. LANGDON, Esq.,
Minneapolis, Minn.:

27 DEAR SIR: Your letter of the 10th inst. I received this morning. I was glad to hear from you, and would like to have you join M'r Watson and myself in gold mining. In answer to your question I will say that there is one-eighth, that is, 7,500 shares, that can be bought, if taken at once, at the same price I paid and at the same that Watson paid. After looking over and prospecting for five weeks, the price is $8,125, and interest on same 4 mo.,=$243.75, total for cash payment, $8,368.75 in gold; and then we have to pay $3,125.00 out of the first net proceeds from mine; that is after we pay about $20,000 for expenses, then we pay as above. The work done on ditch, pipe and improvements amounts to $20,000, but I think we can pay that in one month's work or less. Should you conclude to buy this stock you must telegraph me here on receipt of this letter; then you can pay in New York exchange by adding the price of gold to the amount above cash payment, or you can send me half or more of the cash, as convenient, and a note at 60 days, payable here, for balance of the cash payment, at 12 per cent. in gold for interest, and I can fix it. The $3,125 requires no

note, but a contract to pay, or due-bill payable when made out of dividends, without int. There are several persons after this stock, but I have the refusal of it for ten days. If money was a little easier I would take it all, but then I am satisfied I will get all I want anyway, as old miners all say we have a good mine, and must pay immensely. Then there are other mines that we can take in when we get a good start. This will put you on the ground floor with us, or better
28 than I am, as I have spent about $600 to find this mine, prospect it, and have titles looked up, and see that our title is all O. K. Hoping to hear from you very soon,

I am, very respectfully,

J. W. PENCE.

That said last mentioned letter was received by said plaintiff on or about the 24th day of December, 1874, and that thereupon, on the 26th day of said December, said plaintiff did, in answer thereto, send from Saint Paul, Minnesota, to said defendant, at said San Francisco, a telegram, in words and figures as follows, to wit:

S'T PAUL, MINNESOTA,
Dec. 26th, 1874.

To J. W. PENCE, *Occ't.:*

Will take it, and send draft at once, if it gives our party control of the mines. Answer.

R. B. LANGDON.

Which said telegram was received by said defendant on said 26th day of December, 1874, at said San Francisco. That before and during all of said time said defendant had and exercised full control of the stock of said mining company, held by said M. A. Baldwin, and defendant had also, before said last-mentioned date, purchased and then owned and controlled, and still owns and controls, a considerable amount of the stock of the said Owyhee Water and Gravel Mining Company, besides and in excess of that which said Baldwin and he had acquired by their original purchase; and that at the time that defendant received said last-mentioned telegram the stock of the said Owyhee Water and
29 Gravel Mining Company was so owned, held, and controlled; that upon the purchase by said plaintiff of said 7,500 shares thereof, the party referred to by said plaintiff in his said telegram would have, and ever since said purchase by plaintiff have in fact had, and do now have, a controlling interest in the stock and business of said company and complete control of said mine; that upon the receipt by defendant of said telegram of said plaintiff, defendant did, on the same day, answer the same by telegram from said San Francisco, in words and figures as follows, to wit:

DEC. 26TH, 1874.

To R. B. LANGDON,
Minneapolis, Minn.:

Send draft. We have controlling stock interest. That means business.

J. W. PENCE.

That said last-mentioned telegram was duly received by said plaintiff, and that the above-mentioned two telegrams are the same mentioned in folio six of said complaint. Defendant admits that plaintiff did there-

upon, to wit, on the 28th day of December, 1874, transmit by letter to him, said defendant, payable to his order, a gold-draft for the sum of $8,368.75, and alleges that the said letter of transmittal, in which said draft was enclosed, was in words and figures as follows, to wit:

MINNEAPOLIS, MINN.,
Dec. 28th, 1874.

J. W. PENCE, Esq.:

30 DEAR SIR: Enclosed you will find draft on N. Y. for $8,368.75, in gold, payable to your order. Your telegram was received in good time. Write me particulars in your next.

Yours, truly,

R. B. LANGDON.

Which said letter and draft were duly received by defendant. That, in response to said last-mentioned letter of said plaintiff, said defendant did, on or about the 8th day of January, 1875, write and mail to said plaintiff a letter from said San Francisco giving said plaintiff particulars concerning said stock and mining business, as requested, and did in said letters distinctly inform said plaintiff, that he, said defendant, had sold to him, said plaintiff, said 7,500 shares of stock, and did therein enclose and send to plaintiff a bill or memorandum of sale of the same from said defendant to said plaintiff, which said bill or memorandum was in words and figures as follows, to wit:

SAN FRANCISCO, CAL.,
Jan. 8th, 1875.

Hon. R. B. Langdon, Minneapolis, Minn, to J. W. Pence, D'r.

To 7,500 shares of stock in Owyhee Water and Gravel Mining Company, Elcho Co., Nevada, at one hundred and fifty dollars per share	$11,250, gold.
Interest on $8,125, 4 months	243 75
	$11,493 75
Cr. by cash, gold draft on N. Y	$8,368 75
Balance due out of first nett proceeds	$3,125 00

31 Upon the back of which said bill was written and signed by defendant a receipt, in words and figures as follows, to wit:

SAN FRANCISCO, *Jan. 6th*, 1875.

Received of R. B. Langdon, esq'r, on the within bill, eight thousand three hundred and sixty-eight $\frac{75}{100}$ dollars in sight-draft, on National Park Bank, New York, payable in gold coin.

$8,368.75.

J. W. PENCE.

That said plaintiff received said last-mentioned letter and bill of sale and receipt by due course of mail, and thereupon accepted, and was entirely satisfied with the said purchase and the acts of said defendant, and so remained until a long time thereafter, until the happening of certain subsequent events, more particularly hereinafter stated.

And the defendant alleges that the foregoing constituted and were all the communications of any kind or value whatsoever which passed, and all the transactions had between said plaintiff and said defendant concerning or in any manner relating to said purchase of stock by plaintiff, from the commencement of the negotiations therefor to the final consummation thereof.

And the defendant denies that plaintiff was induced to negotiate for or purchase said stock by, or relying upon, any representations or statements of defendant, but alleges that he was induced to negotiate therefor from and by information received from other sources, and purchased the same, relying upon his own judgment and upon such information, and that said plaintiff well knew during the whole time of such negotiations, and at the time of his said purchase, the character of
32 said stock and of said mine, and the uncertainties attending the same, and that it was impossible to foretell with certainty whether the same would prove to be of great value or otherwise, and purchased the same as a speculation, assuming the same chances and risk of gain or loss thereby as other holders of the stock of said company.

And defendant alleges that he was never at any time instructed by said plaintiff to purchase for him other stock of said mining company than that owned by defendant, and that it was never understood nor agreed that defendant should do so, or should not sell said plaintiff any of his said defendant's stock, but that said plaintiff desired to get an interest in said stock and mining business either by buying stock of defendant or of any other person who could and would sell the same, and upon such terms as would be satisfactory to all parties concerned.

And defendant alleges that said plaintiff well knew during all the time of said negotiation, and at the time of said purchase and the sending of said draft and receiving said bill of sale, that he was buying said 7,500 shares of stock directly of and from this defendant, and that defendant would and did and had the right to receive and appropriate the said purchase-money thereof; and defendant alleges that at the time of said purchase of said stock by said plaintiff said mine had not been, as said plaintiff well knew, so worked or operated as to enable any person to determine with certainty whether it would prove pro-
33 fitable or otherwise, and that the value thereof and of said stock could only be and was estimated upon the result of prospecting said mine, and the judgment of persons experienced in mining business; and that as mining stock in the situation the mine was then in said stock so as aforesaid sold to plaintiff was then well worth the price paid therefor by plaintiff.

And defendant denies that any of the statements or representations of defendant so as aforesaid or ever made to plaintiff concerning said stock or said mine or said mining business were false or made with any intent to cheat or defraud said plaintiff, and denies that said plaintiff was in any manner deceived, misled, cheated, or defrauded thereby, or in or about said transaction, or that said draft was fraudulently obtained by defendant, but alleges that each and every of such statements and representations was true, and made by defendant honestly and in good faith, and only with an honest desire to aid said plaintiff in accomplishing his wish to get an interest in said mining business, and under an honest belief that said plaintiff would by said investment, together with the other owners of stock in said mining company, realize large profits therefrom.

And defendant denies that he ever offered to act as agent of said plaintiff or about said matter, or that he ever did act as such agent, or

that he ever was plaintiff's agent for any purpose, but alleges that in all he did in or about said transaction to aid said plaintiff as aforesaid he acted gratuitously at plaintiff's request, and only for his accom-
34 modation; and further alleges that defendant was not in any manner benefited by the said transaction, and that but for the said first-mentioned letter of said plaintiff to defendant said contract of said defendant with said Beechy for the sale of said 7,500 shares of stock to him, said Beechy, which was the same 7,500 shares sold to said plaintiff, would not have been rescinded, and that said defendant would thereby have realized the same for said 7,500 shares as he did from said plaintiff.

And defendant alleges that after the purchase of said stock by plaintiff, working and operation of said mine was commenced and carried on for a considerable time during the spring and summer of the year 1875 by and in behalf of the owners of the stock of the said mining company, including said plaintiff; that during said summer, and on or about the 20th day of June, 1875, said plaintiff, together with said Shepard and Linton, mentioned in said complaint, and this defendant, visited said mine and ascertained the result of operations therein to that time, and then, and not before, it was for the first time discovered by all of said persons, including this defendant, that said mine would not probably yield so large profits as had been anticipated, and that thereupon, for the first time, said plaintiff pretended and attempted to find fault and complain about the sale of said stock to him; and that until said last mentioned time, said plaintiff did never in any manner complain or object thereto; and defendant alleges that the true and only reason why said plaintiff seeks to rescind said sale and recover back the
35 money paid by him for said stock, is that he is disappointed in the result thereof, and anticipates that the speculation, so as aforesaid thereby entered into by him, will not prove profitable.

Defendant admits that said gold draft of $8,368.75 was worth the sum of $9,425.29 in currency.

Defendant alleges that as to whether said David C. Shepard and said Alonzo N. Linton, or either of them, were connected in business with plaintiff or interested with said plaintiff in said purchase of said shares of stock, or the money paid therefor, or as to whether said Shepard and Linton, or either of them, have sold or assigned or transferred to plaintiff any right, title, or interest in and to any moneys, or to any right of action, actual or pretended, defendant has not any knowledge or information sufficient to form a belief. And as to the allegations in said complaint that no certifi. or other evidence of ownership of said shares of stock sold to plaintiff has ever been delivered by defendant or received by plaintiff, defendant alleges the fact to be that, at the time of said sale of said shares to plaintiff, the certificates of said stock, together with other certificates of stock in said mining company, were deposited in the National Gold Bank and Trust Company, of said San Francisco, for safe keeping and the protection of all persons interested therein, of which said plaintiff had due notice, as alleged in his said complaint, and that the same have ever since there remained, as plaintiff has at all times well known; that although no formal endorsement of trans-
36 fer of said shares has been made upon said certificates by said defendant, he defendant has, as plaintiff has at all times well known, always been ready and willing to make such endorsement or to do any or all things requisite and necessary to formally transfer the said shares, and has, before the commencement of this action, offered so to do, and still is able, ready, and willing, and hereby offers so to do;

that said plaintiff has in his possession good and sufficient evidence in writing of his ownership of said shares of stock, to wit, said written memorandum or bill of sale above herein mentioned, by and upon which he can at any time procure a formal transfer of said shares of stock to and in his own name upon the books of said mining company.

And defendant denies that said plaintiff or said Shepard, or said Linton, did, on or about the 20th day of June, 1875, or at any time until a few days before the commencement of this action, ever notify the defendant that they, or either of them, rescinded, or would rescind such purchase of such shares, or that they should not be bound thereby, or demanded of said defendant that he pay back to them, or either of them, the amounts of money paid, or which defendant realized from said draft or any thereof.

Wherefore said defendant prays judgment that he be hence dismissed with judgment for his costs and disbursements of this action.

SHAW AND LEVI,
Att'ys for defendant, Minneapolis, Minnesota.

37 STATE OF MINNESOTA,
County of Hennepin, ss :

J. W. Pence came before me personally, and being duly sworn, doth say that he is the defendant in the above-entitled action; that the foregoing answer is true of his own knowledge, except as to those matters therein stated on his information and belief; and, as to those matters, that he believes it to be true.

J. W. PENCE.

Subscribed and sworn to before me on this 7th day of Sept., A. D. 1875.

[L. S.] ALBERT L. LEVI,
Notary Public, Minnesota.

(Endorsed:) District court, 4th judicial district, Hennepin County. Robert B. Langdon, pl'ff, vs. John W. Pence, def't. Answer. Filed Nov. 17th, 1875. D. W. Albaugh, clerk, by W. Freshour, deputy. Shaw and Levi, attorneys for def't, Minneapolis, Minnesota.

Notice of trial.

STATE OF MINNESOTA.

District court, county of Hennepin, 4th judicial district.

ROBERT B. LANGDON, PL'FF,
vs.
JOHN W. PENCE, DEF'T.

Take notice: That the issue of fact in the above-entitled action will be brought on for trial at the next general term of the court afore-
38 said, appoint' to be held in and for the county of Hennepin, at the court-house in the city of Minneapolis, in said county, on Tuesday, the 16th day of November, 1875, at the opening of the court on that day, or as soon thereafter as counsel can heard, or at the next term of the circuit court of the United States for the 8th circuit, to be held at the custom-house in the city of S't Paul, State of Minnesota, on the second Monday in December, 1875, at the opening of said court on that day, or as soon thereafter as counsel can be heard in case, said

cause shall be removed to said U. S. court, pursuant to petition and bond of defendant.

Yours, respectfully,

SHAW AND LEVI.
Att'ys for def't, Minneapolis, Minn.

To Mess'rs LOCHREN, MCNAIR and GILFILLAN,
Att'ys for pl'ff, Minneapolis, Minn.

(Endorsed:) District court, Hennepin county, 4th judicial district, Minnesota. Robert B. Langdon versus John W. Pence. Notice of trial. Shaw and Levi, attorneys for def't, Minneapolis, Minnesota.

Notice.

District court, fourth judicial district.

STATE OF MINNESOTA,
County of Hennepin:

ROBERT B. LANGDON, PLAINTIFF,
vs.
JOHN W. PENCE, DEFENDANT.

To Mess'rs Lochren, McNair, and Gilfillan, attorneys for pl'ff, Minneapolis, Minn.

39 Gents: You will please take notice that a general term of said court, to be begun and holden at the court-house in the city of Minneapolis, in said county and State, on Tuesday, the 16th day of November, A. D. 1875, at 10 o'clock a. m. of said day, at the opening of said court or as soon thereafter as counsel can be heard, we shall, for and in behalf of said defendant, move said court that the above-entitled action be transferred to the circuit court of the United States in and for said district of Minnesota, and will, thereupon read and present to said court the petition and bond of said defendant, which on said day we shall file with the clerk of said district court, true copies of which are herewith served on you, and which will sufficiently apprise you of the ground of said motion. You will govern yourselves accordingly.

SHAW AND LEVI,
Attorneys for Defendant, Minneapolis, Minn.

Petition for removal.

District court, 4th judicial district.

STATE OF MINNESOTA,
County of Hennepin, ss:

ROBERT B. LANGDON, PLAINTIFF,
vs.
JOHN W. PENCE, DEFENDANT.

To the honorable the district court of the fourth judicial district in and for the county of Hennepin:

40 The petition of John W. Pence, of the city of San Francisco, in the State of California, respectfully shows that your petitioner is the defendant in the above entitled action, and that the same was

brought by Robert B. Langdon on or about the 16th day of August, A. D. 1875, in the district court to be held in the county of Hennepin, in the said fourth judicial district of said State of Minnesota, and that the said plaintiff is and was at the time of bringing said suit, and yet is a citizen of said county of Hennepin, and State of Minnesota, and that your petitioner is, and was at said time of bringing said suit, a citizen of the State of California.

And your petitioner further respectfully shows that there is and was at the time when said suit was brought, a controversy therein between a citizen of the State of Minnesota, to wit, the said Robert B. Langdon, plaintiff in the said suit, and a citizen of the State of California, to wit, your petitioner, the defendant therein, and further that the said plaintiff claims in the summons and complaint in said suit as damages against your petitioner, the sum of nine thousand four hundred and twenty-five and $\frac{20}{100}$ dollars, and that the matter in dispute in said suit, therefore, exceeds the sum of five hundred dollars exclusive of costs.

And your petitioner further respectfully represents that issue was therein joined on the 8th day of September, 1875, but that said suit has not yet been tried, but the same is pending for trial in said district court, at the city of Minneapolis, in the said county of Hennepin, and that your petitioner desires to remove said suit before the trial thereof
41 into the next circuit court of the United States to be held in the district of Minnesota in the eighth circuit, in pursuance of the laws as contained in the act of Congress approved March 3d, A. D. 1875, and that he is ready and willing to give such good and sufficient surety, as this court may direct, for his doing all acts and things required to be done by the said provisions of law, upon the removal of a suit into the United States court, and he offers herewith his bond executed by Peter Wolford and Thomas J. Buxton of the city of Minneapolis, in said county and State, as sureties, in the penal sum of one thousand dollars, conditioned that your petitioner shall enter in the next circuit court of the United States to be held in the district of Minnesota, in the eighth circuit, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and do such other appropriate acts as by the said act of Congress are required to be done upon the removal of a suit into the United States court, as good and sufficient surety according to the said provisions of law upon the removal of a suit into the United States court.

And your petitioner therefore prays that said bond may be accepted as good and sufficient surety according to the said provisions of law, and that the said suit may be removed into the next circuit court of the United States to be held in the said district of Minnesota, in the eighth circuit, pursuant to the statute of the United States in such case made and provided, and that no further proceedings may be had therein
42 in this court. And your petitioner will ever pray, etc.

JOHN W. PENCE,
Petitioner.

SHAW & LEVI,
Attorneys for Petitioner, Minneapolis, Minnesota.

STATE OF CALIFORNIA,
County of San Francisco, ss:

John W. Pence, the petitioner in the foregoing petition, being duly sworn, deposes and says that he has read the petition above set forth and subscribed by him, and knows the contents thereof, and that the

same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true; and further saith not.

JOHN W. PENCE.

Subscribed and sworn to before me on this 18th day of October, A. D. 1875.

[L. S.] JAMES L. KING,
Notary Public.

STATE OF MINNESOTA,
County of Hennepin, ss:

Know all men by these presents that we, John W. Pence, as principal, and Peter Wolford and T. J. Buxton, as sureties, are held and firmly bound unto Robert B. Langdon in the sum of one thousand dollars lawful money of the United States, to be paid unto the said Robert B. Langdon, his heirs, executors, administrators, or assigns, for which
43 payment well and truly to be made we jointly and severally bind ourselves, our heirs, administrators, assigns, and executors, firmly by these presents, sealed with our seals and dated this 18th day of October, A. D. 1875.

The condition of this obligation is such that whereas a suit was brought on or about the 16th day of August, A. D. 1875, in the district court of the 4th judicial district of the State of Minnesota, in and for the county of Hennepin, by the said Robert B. Langdon against the said John W. Pence, and the same is now pending for trial, in the city of Minneapolis in said county, in said court, and is removable into the circuit court of the United States for the district of Minnesota, in the 8th circuit, under the act of Congress approved March 3d, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes"; and whereas the said John W. Pence has made and filed his petition in said district court for the removal of said suit into the next circuit court of the United States to be held in the said district of Minnesota:

Now, therefore, the condition of the above obligation is such that if the above-bounden John W. Pence, or his legal representatives, shall enter or cause to be entered in the circuit court of the United States for the said district of Minnesota on the first day of its stated session next ensuing after the order of said district court for the removal of said suit into said circuit court, a copy of the record in said suit together with copies of all process, pleadings, depositions, testimony, and other
44 proceedings therein, and shall pay all costs that may be awarded by the said circuit court if said court shall hold that said suit wrongfully or improperly removed thereto, and shall also there appear and enter special bail in said suit, if the same was originally requisite therein, and shall do or cause to be done all other appropriate acts as by the said act of Congress are required to be done upon the removal of a suit into the United States court, then this obligation shall be void; otherwise of force.

In testimony whereof we have hereunto set our hands and seals on this 18th day of October, A. D. 1875.

JOHN W. PENCE. [SEAL.]
PETER WOLFORD. [SEAL.]
THO'S J. BUXTON. [SEAL.]

Signed, sealed, and delivered in the presence of—
As to John W. Pence—
EDW'D CHATTIN.
JOHN H. B. WILKINS.

As to Wolford and Buxton—
ALBERT L. LEVI.
R. J. MENDENHALL.

STATE OF MINNESOTA,
County of Hennepin, ss:

Be it known that on this 26th day of October, A. D. 1875, came before me personally Peter Wolford and T. J. Buxton, to me well known to be the same persons who executed the foregoing bond, and each severally acknowledged the same to be his own free act and deed.

[L. S.] ALBERT L. LEVI,
Notary Public, Minnesota.

45 STATE OF MINNESOTA,
County of Hennepin, ss:

Peter Wolford and T. J. Buxton, upon oath, doth say, each for himself, that he is one of the sureties above named; that he is a resident and freeholder of and in the State of Minnesota, and worth the amount of two thousand dollars, specified in the foregoing bond, above his debts and liabilities, and exclusive of his property which is exempt from execution.

PETER WOLFORD,
THO'S J. BUXTON.

Subscribed and sworn to before me on this 26th day of October, A. D. 1875.

[L. S.] ALBERT L. LEVI,
Notary Public, Minnesota.

(Endorsed:) Bond of J. W. Pence to Robert B. Langdon. I hereby approve the within bond and the sureties thereon. Dated Nov. 6th, A. D. 1875. Cha's E. Vanderburgh, judge 4th judicial dist. Minn. Shaw and Levi, att'ys for def't and petitioner, Minneapolis, Minn.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Be it known that on this 18th day of October, A. D. 1875, came before me personally John W. Pence, to me well known to be the same person who executed the foregoing bond as principal therein, and he acknowledged the same to be his own free act and deed.

JAMES L. KING,
Notary Public in and for the City and County of San Francisco, California.

46 (Endorsed:) District court, 4th jud. dist., Hennepin Co., Minn. Robert B. Langdon, pl'ff, vs. John W. Pence, def't. Petition and bond for removal of suit to U. S. circuit court. Filed November 16th,

1875. D. W. Albaugh, clerk. Shaw and Levi, attorneys for def't and petitioner, Minneapolis, Minn.

Order.

District court, 4th judicial district.

STATE OF MINNESOTA,
County of Hennepin, ss:

ROBERT B. LANGDON }
vs.
JOHN W. PENCE. }

On this 16th day of November, A. D. 1875, came on the above-entitled cause to be heard before the court, at a general term thereof, upon the motion of def't for a transfer of said cause to the circuit court of the United States in and for the 8th circuit; present, Mess'rs Lochren, McNair, and Gilfillan, attorneys for plaintiff, and Mess'rs Shaw and Levi, attorneys for said defendant; and the court having hea'd the allegations and proofs thereon, and the arguments of counsel, and being fully advised in the matter, it is ordered by the court that the above-entitled cause be and the same is hereby transferred to the circuit court of the United States in and for the 8th circuit and district of Minnesota.

C. E. VANDERBURGH, *Judge.*

(Endorsed:) District court, Hennepin Co., Minnesota. Lang-
47 don vs. Pence. Order transferring cause to U. S. circuit court. Filed November 17th, 1875. D. W. Albaugh, clerk, by W. Freshour, deputy.

Clerk's certificate.

District court, 4th judicial district.

STATE OF MINNESOTA,
County of Hennepin:

ROBERT B. LANGDON }
against
JOHN W. PENCE. }

I, Daniel W. Albaugh, clerk of the above-named court, do hereby certify that I have compared the papers-writing to which this certificate is attached, and that the same are true and correct copies of the register entry, summons, complaint, affidavit, and bond for attachment, writ of attachment and sheriff's return thereon, answer, notice of trial, notice of motion for transfer to U. S. court, petition, bond, and order of court removing cause to U. S. circuit court; the same composing all the files and records in the above-entitled action, as the same appears of record and on file in the said clerk's office at the court-house in said Hennepin County, Minnesota.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Minneapolis, this 1st day of December, A. D. 1875.

[SEAL.]

D. W. ALBAUGH, *Clerk,*
By W. FRESHOUR, *Deputy.*

48 (Indorsed:) United States circuit court, district of Minnesota. Robert B. Langdon vs. John W. Pence. Return from State court. Filed Dec. 9, 1876. H. E. Mann, clerk.

49 United States circuit court for the district of Minnesota. Term minutes December term, A. D. 1875, December 13, 1875.

ROBERT B. LANGDON }
vs.
JOHN W. PENCE. }

The defendant, by C. K. Davis, esq., & Mess'rs Shaw & Levi, his attorneys, appears and moves that this cause, which was moved from the district court of Hennepin County, Minnesota, be placed upon the calendar for trial; which motion is granted. Whereupon the plaintiff, by Mess'rs Lochren, McNair & Gilfillan, his attorneys, gave notice of a motiion for a continuance.

50 United States circuit court for the district of Minnesota. Term minutes December term, December 15, 1875.

ROBERT B. LANGDON }
vs.
JOHN W. PENCE. }

And now comes the plaintiff, by his attorneys, and presents his motion for a continuance, which, with the defendant's objections thereto, is submitted to the court.

51 United States circuit court for the district of Minnesota. Term minutes, December term, 1875. December 16, 1875.

ROBERT B. LANGDON }
vs.
JOHN W. PENCE. }

A motion for a continuance having been submitted by the plaintiff, and considered by the court, it is ordered that this cause do stand continued until the next term of this court; and it is further ordered and adjudged that the defendant recover of and from the plaintiff his costs of the term to be taxed, and that execution issue therefor.

52 United States circuit court for the district of Minnesota. Term minutes June term, A. D. 1876. June 20, 1876.

ROBERT B. LANGDON }
vs.
JOHN W. PENCE. }

This cause coming on to be heard, Mess'rs Lochren, McNair and Gilfillan appeared for the plaintiff and C. K. Davis, esq., appeared for the defendant. Whereupon a jury being called came, to wit: Olaf Noodvold, R. J. Jones, A. M. Stiles, A. W. Sanborn, Elias W. Holman, Charles Haus, J. A. Thatcher, Geo. W. Benedict, W'm M. Runnells, J. A. Coe, Ole Penerts, A'drew Larsen, who are duly impanelled and sworn.

W'm Lochren, esq., opens the case on the part of the plaintiff.

53 United States circuit court for the district of Minnesota. Term minutes, June term, A. D. 1876. June 21, 1876.

ROBERT B. LANGDON
vs.
JOHN W. PENCE.

This cause coming on for further trial, the parties appeared, by their attorneys, and the jury heretofore impanneled and sworn herein being called also came.

Robert B. Langdon is sworn and examined as a witness for plaintiff.
D. C. Shepard " " " " " " " " " "
A. H. Linton " " " " " " " " " "

54 United States circuit court for the district of Minnesota. Term minutes, June term, A. D. 1876. June 22d, 1876.

ROBERT B. LANGDON
vs.
JOHN W. PENCE.

This cause coming on for further trial, the parties appeared, by their attorneys, and the jury heretofore sworn and impannelled herein being called, came also.

C. K. Davis, esq., opens the case for the defendant.

John W. O'Brien is sworn and examined as a witness for defendant.

55 United States circuit court, district of Minnesota. Term minutes, June term, A. D. 1876. June 23d, 1876.

ROBERT B. LANGDON
vs.
JOHN W. PENCE.

This cause coming on for further trial, the parties appeared by their attorneys, and the jury heretofore sworn and impannelled herein came, except Elias W. Holman, who, it appeared, had been taken suddenly ill and was unable to attend. Whereupon the parties consented that said juror be excused, and that the trial in this case proceed before and the cause be determined by the eleven remaining jurors the same as it would have been by the full pannel had said juror not been excused.

J. W. Pence is further examined as a witness for defendant, and here the defendant rests.

D. C. Shepard is recalled and further examined as a witness for plaintiff.

R. B. Langdon is recalled and further examined as a witness for plaintiff.

A. H. Linton is recalled and further examined as a witness for plaintiff.

C. K. Davis, esq., sums up for defendant.

W. W. McNair, esq., sums up for the plaintiff.

Charge is given the jury by the court, and they retired in charge of an officer duly sworn and qualified to attend them, to consider of their verdict.

56 United States circuit court for the district of Minnesota. Term minutes, June term, A. D. 1876. June 24th, 1876.

ROBERT B. LANGDON
vs.
JOHN W. PENCE.

The jury, heretofore impannelled and sworn herein, being returned into court, say they find a verdict for the plaintiff in the sum of nine thousand four hundred and twenty-five dollars and twenty-nine cents, with nine hundred and sixty-two dollars and sixteen cents interest, making in all ten thousand three hundred eighty-seven dollars and forty-five cents ($10,387.45).

United States circuit court for the district of Minnesota. Term minutes, June term, A. D. 1876. June 27th, 1876.

ROBERT B. LANGDON
vs.
JOHN W. PENCE.

On motion of defendant, plaintiff consenting, ordered, that defendant have twenty days to prepare a bill of exceptions, and that all further proceedings herein be stayed for that time.

57 United States circuit court for the district of Minnesota. Term minutes, June term, A. D. 1876. August 14th, 1876.

ROBERT B. LANGDON
vs.
JOHN W. PENCE.

This cause being here tried before a jury, who, on the 24th day of June, A. D. 1876, found a verdict for the plaintiff and assessed his damages at the sum of ten thousand three hundred eighty-seven dollars and forty-five cents, and on the 27th day of June, 1876, an order having been entered herein, on the defendant's motion, staying all further proceedings herein for twenty days to enable the defendant to prepare a bill of exceptions; and said bill of exceptions having been prepared, settled, signed, and filed in this court; now, on motion of plaintiff's attorneys, it is by the court considered, ordered, and adjudged that the defendant's motion for a new trial be, and the same is hereby, denied, & that the plaintiff do have and recover of and from the defendant the said sum of ten thousand three hundred eighty-seven dollars and forty-five cents, his damages aforesaid, in manner and form aforesaid assessed, with interest thereon from said 24th day of June, 1876, being $100.99, amounting in all to the sum of ten thousand four hundred eight'-eight dollars and forty-six cents, besides his costs and disbur'ements by him in and about his suit in this behalf expended, taxed at $133.55, and that the plaintiff have execution therefor.

57½ Judgment record signed this 14th day of August, A. D. 1876.
H. E. MANN, *Clerk.*

58 United States circuit court, district of Minnesota.

ROBERT B. LANGDON, PLAINTIFF,
vs.
JOHN W. PENCE, DEFENDANT.

The above-entitled action came on for trial at the June (1876) term of said court, and was tried by a jury duly empannelled and sworn, and to prove the issue on his part the plaintiff read in evidence the following letters:

MINNEAPOLIS, MINN., *Dec. 10th*, 1874.

J. W. PENCE, Esq.,
San Francisco, California:

DEAR SIR: I have had a talk with M'r Watson about your Nevada mining business, and it looks to me all right. He wishes me to write you and see what arrangements could be made about getting into or buying out the old claimants. If anything can be done that will be satisfactory to all parties, let me know. Money close, as usual.

Yours, truly,

R. B. LANGDON.

SAN FRANCISCO, *Dec. 17th*, 1874.

R. B. LANGDON, Esq.,
Minneapolis, Minn.:

59 DEAR SIR: Your letter of the 10th inst. I received this morning. I was glad to hear from you, and would like to have join M'r Watson and myself in gold mining. In answer to your question, I will say that there is an eighth (that is, 7,500 shares) that can be bought, if taken at once, at the same I paid and the same that Watson paid, after looking over and prospecting for five weeks. The price is $8,125 and interest on same 4 mo., $243.75; total per cash payment, $8,368.75 gold; and then we have to pay $3,125.00 out of the first net proceeds from mine; that is, after we pay about $20,000 for expenses, then we pay as above. The work done on ditch-pipe and improvement amounts to $20,000, but I think we can pay that in one month's work, or less. Should you conclude to buy this stock, you must telegraph me here on receipt of this letter; then you can pay in New York exchange by adding the price of gold to the amount of above cash payment. Or you can send me half or more of the cash as convenient, and a note at sixty days, payable here, for the balance of cash payment, at 12 per cent. interest in gold for interest, and I can fix it.

The $3,125 requires no note but a contract to pay, or due bill payable when made out of dividends, without interest. There are several persons after this stock, but I have the refusal for ten days. If money was a little easier I would take it all, but then I am satisfied I
60 will get all I will want any way, as old miners all say we have a good mine and must pay immensely. Then there is other mines that we can take in when we get a good start. This will put you on the ground floor with us, or better than I am, as I have spent about $600 to find this mine, prospect it, and have title looked up, &c., &c. Our title is all O K. Hoping to hear from you very soon, I am,

Yours, respectfully,

J. W. PENCE.

The plaintiff offered in evidence the following telegraphic message sent by the defendant at San Francisco, and received by him:

SAINT PAUL, MINN., *Dec. 26th*, 1874.

To J. W. PENCE:

Will take it and send draft at once, if it gives our party control of the mines. Answer.

R. B. LANGDON.

The plaintiff offered in evidence the following letter sent to and received by the defendant:

MINNEAPOLIS, MINN., *Dec. 28th*, 1874.

J. W. PENCE, Esq.,
San Francisco, Cal.:

61 DEAR SIR: Enclosed you will find draft on N. Y., for $8,368.75 in gold, payable to your order.

Your telegraph was received in good time. Write me particulars in your next.

Yours, truly,

R. B. LANGDON.

Also offered the following telegram sent by defendant and received by plaintiff:

SAN FRANCISCO, CAL., *Dec. 26th*, 1874.

R. B. LANGDON,
Minneapolis, Minn.:

Send draft. We have controlling stock interest; that means business.

J. W. PENCE.

Also the following telegraphic message in answer to last:

MINNEAPOLIS, MINN., *Dec. 28th*, 1874.

J. W. PENCE,
Occidental Hotel, San Francisco, Cal.:

Have forwarded draft.

R. B. LANGDON.

Also the following letter written by defendant and received by the plaintiff:

SAN FRANCISCO, *Jan. 8th*, 1875.

Hon. R. B. LANGDON,
62 *Minneapolis, Minn.:*

DEAR SIR: Your letter of Dec. 28th, 1874, I received, containing a sight gold draft on Nat. Park Bank, N. Y., for 8,368.15 dollars, which your a/c has credit for, and enclosed please find bill and receipt. There have been not less than ½ doz. after the 7,500 shares of stock I sold you, and all were astonished to find themselves too late, and still more astonished when I told them there is no more to be had at present, as we have the controlling interest, and propose to run the mine as we think best. The weather has been fine up at the mines, and if we had been in shape with our reservoir and water we could have run up to the 25th of Dec. I have written M'r John Watson to come out about the middle of Feb.

and look over the mines in this State and see all the late improvements in placer mining, as we want to work our mine in the best possible way. I have several placer mines in view in this State which I want him to examine. I would like to have one or two mines here where we can and could work all winter. There have been some great bargains sold in placer mines here, and no doubt many more left. You can see him when he comes to Minneapolis and talk it over with him, and if you want to join us in a mine or two here, all right. I tell him to arrange to bring all the money he can get collected, as that is what tells with those having bargains to sell. There have been millions made
63 here in stocks, mostly in Comstock or Virginia City mines. There are fine chances here to operate in mining stock. All you have to do is to look out and know how it is yourself. In settling up our accounts for expenses, improvement, and spring supplies, which we have bills and vouches for, we find that they amount to $20,000.00. That includes interest on this amount up to May. This I became personally responsible at the bank for. I thought but to borrow this amount at 1 per cent. per month until we could make it out of the mines, knowing that money matters were and are very close in your city, and exchange on gold high price, but should you and Watson prefer to pay your proportions you can at any time. The stock I have deposited with the Nat. Gold Bank and Trust Company of this city. We have made that bank our treasurer, so it is all safe. The balance on your 7,500 shares of stock is $3,125.00 in gold. This amount is to be paid out of the first net proceeds your $\frac{1}{8}$ of the capital stock is entitled to. M'r Baldwin, who was the sup't last season, says the mines are worth $1,000,000. He owns $\frac{1}{8}$, and says he will not sell his. His stock cost him about $200, and his time more than yours cost you. I think we will clean up our expenses and make a good dividend next spring. I would like to have you come out after roads get good and weather pleasant in the spring. I hope to hear from you when convenient.

Yours, &c.,

JOHN W. PENCE.

This letter enclosed the following:

64 SAN FRANCISCO, CAL., *Jan. 8th*, 1875.

Hon. R. B. Langdon, Minneapolis, Minn., to J. W. Pence, D'r.

	Gold.
To 7,500 shares of stock in Owyhee Water and Gravel Mining Co., Elko County, Nevada, at one hundred and fifty dollars per share	$11,250
Interest on $8,125, 4 months	243 75
	$11,493 75
C'r by cash, gold-draft N. Y.	8,368 75
Bal. due out of first net proceeds	$3,125

On the back of the above was written the following:

SAN FRANCISCO, *Jan. 6th*, 1875.

Rec'd of R. B. Langdon, esq, on the within bill, eight thousand three hundred sixty-eight $\frac{75}{100}$ dollars in sight draft on Nat. Park Bank, New York, payable in gold coin.

$8,368.75. J. W. PENCE.

The plaintiff a'so offered the following letter received by him and written by the defendant:

SAN FRANCISCO, CAL., *Feb.* 10*th*, 1875.

Hon. R. B. LANGDON,
Minneapolis, Minn.:

DEAR SIR: At my request the trustees of the Owyhee Water
65 and Gravel Mining Company had a meeting yesterday; the following business was transacted. Gen. La Grange and M'r Pierson resigned as trustees and M. A. Baldwin resigned as superintendent. We then elected you in place of Gen. La Grange, and John Watson in place of M'r Pierson; John Watson was also elected superintendent. The officers of the co. are J. W. Pence, R. B. Langdon, John Watson, M. A. Baldwin, and Bernard Lande, trustees, with John Watson, superintendent, and Bernard Lande, sec'y. This arrangement gives us complete control of the mines, and with John Watson at the front, I think we will very soon pay off the debt and get our money back with big interest. I am well satisfied with the advantages and climate of this Pacific coast. There appears to be no end to the resources of this country; new mines are being discovered almost every day, and the old ones growing better as they get deeper, with a few exceptions. I think we will have plenty of water for a few months in the spring at our mine, as the snow is four feet deep up there. I will expect John Watson here about the last of this month. I see by the papers that you are cross-firing on the Senators to be elected. Col. W'm S. King, I believe, is looking up some fine stock in Canada. I hope to see you out here in the spring. Please write me when convenient.

Very truly yours,

J. W. PENCE.

Also the following letter written by the plaintiff and received by the defendant:

66 MINNEAPOLIS, MINN., *March* 15*th*, 1875.

J. W. PENCE, Esq.:

DEAR SIR: Yours of Feb. 10th is at hand and has been for some time. My matters in the legislature took my time so I hardly thought of anything else. We finally got through all right and in good style as you have seen by the paper; have got a good man for a Senator. Col. W. S. King has not got home, but they say he is in Washington. I see that you have reorganized and have got control of the mine, and hope we shall be able to go ahead and make the mine pay. I will go over when I hear from you, and Shepard will go with me. Shepard and Linton have taken that stock with me, and if things look well want more. I shall stay there some time and look around. I wish to make our company a strong one. We have a good deal of snow and more a coming; have had a very cold winter and a good deal of it. Everything all right.

Yours, truly,

R. B. LANGDON.

Also the following letter written by the defendant and received by the plaintiff:

SAN FRANCISCO, *April* 13*th*, 1875.

R. B. LANGDON, Esq.:

67 DEAR SIR: Your letter I received some time ago, and have been waiting to hear from John Watson, our sup't; he went to the

mines about two weeks ago; the snow was so deep he was compelled to leave his wagon and horses and to go on snow-shoes and afoot for 25 miles. I rec'd a letter from him last evening; he got through in fair shape, but found the snow from 2 to 18 feet deep when he arrived there at camp, which will give us plenty of water and, I think, guarantee us handsome returns; he was getting ready to start cleaning ditches, uncovering the pipe, and putting things in order. The foreman and several hands are with him. He says provisions are very short up there, also wood. We left and arranged enough there last fall to start on this spring, but the excitement and one thing and another took so many in there last winter, that they eat everything up or nearly so. The roads will be bad for at least one month to come, and I think we had better not go in until the roads are in fair passable condition, and then when we get there will have a chance to get around, and in the time I will try and get in some supplies. I have shipped some for Watson and the miners to live upon until the roads get passable. I will let you know when to come and what to bring with you. I see by your letter that you have taken in Mess'rs Shepard and Linton, which I am perfectly satisfied with, only it makes your interest very small, but, as you say, if it proves good you can buy more.

M'r M. A. Baldwin, who owns ⅛, that is, when the debt is paid,
68 came to me a few days ago and said he had found a fine gulch mine and wanted help. I was not prepared to help him, so after trying several days without success, he offered to sell his interest in our mine. He thinks it is worth $5 per share, but he finally said he would take costs and interest same as you paid. I thought then of you and your firm wanting more, but as you had never seen the mines I concluded best to put him off until you went up there and satisfied yourself. He has since made arrangements with some Eastern capitalists to furnish him money to develop his mine, and said he would not sell at present.

Yours, truly,

J. W. PENCE.

It was proved that these letters and telegrams were sent and received in the ordinary time of transmission. It appeared that the said letters and telegrams were the only evidence offered up to this time to establish the agency set up in the complaint; and thereupon Robert B. Langdon, the plaintiff, having been duly sworn as a witness in his own behalf, the plaintiff proposed to prove by him the alleged fact that the defendant sold to him his, defendant's, own stock, and thereupon defendant objected to such proof or to any further testimony in the case upon the grounds—

1st. That it being admitted, as was the fact, that the said let-
69 ters and telegrams were the only evidences of any agency, the same failed to establish any such agency.

2d. That the letters from Pence to Langdon of January 8th, 1875, and the account rendered and receipt sent therewith were a distinct notification that the stock which the defendant sold to the plaintiff was his, defendant's, stock, or at least sufficient to put the plaintiff upon inquiry as to that fact.

But the court overruled such objection, to which rulings the defendant then and there duly excepted, and his exception was noted and allowed.

It appeared from the testimony offered by the plaintiff that he and Mess'rs Shepard and Linton, the parties mentioned in the complaint as being interested with him in the purchase of this stock, read the various letters and telegrams above copied, as well as the said letter of January 8th, 1875, and the bill rendered and the receipt which accompanied the

same at or about the time when the same were respectively sent, and the letter of January 8th was received by plaintiff some time in the same month.

It also appeared by the testimony on the part of the plaintiff that about June 20th, 1875, the plaintiff and Shepard and Linton, who were residents of Saint Paul and Minneapolis, Minnesota, having gone to Nevada to visit the mine, met the defendant, who was a resident of San Francisco, at Elko, Nevada, for the purpose of visiting the mine, which was situate about 70 miles from Elks and inspecting its workings; that they arrived at the mine on Saturday.

70 The plaintiff offered the testimony of himself and other witnesses which was received, which tended to prove that on the next day to wit, on Sunday, he notified the defendant for the first time that he would not hold himself bound by the contract for the reason that he, defendant, had sold him his, defendant's, own stock, and the plaintiff, with the concurrence of Shepard and Linton, repudiated and disaffirmed the contract and transaction concerning the purchase of the stock. It appeared that this was the first notification ever given that the defendant would hold himself not bound by the contract.

Testimony was offered by the plaintiff and the said parties interested with him, that they did not know that the stock sold was the defendant's own stock until the visit to the mines; and the defendant objected to said testimony, because the letters and telegrams controlled and conclusively determined the rights of the parties; which objection was overruled and defendant excepted, and said testimony was received.

The plaintiff introduced no other evidence to establish the agency pleaded or the notification of rescession than that above referred to, and after having introduced evidence upon the other issues of the case, rested.

Whereupon the defendant moved the court to instruct the jury to bring in a verdict for the defendant for the following reasons:

1st. That no agency had been proved.

2nd. That in the letter of January 8th, 1875, from Pence

71 to Langdon, and the account of sale and the receipt accompanying the same were a distinct notification to the plaintiff that the defendant had sold him his, the defendant's, own stock, or at least were sufficient to put the plaintiff on inquiry as to that fact.

3d. That the notice of re'cission of the contract made at the mine in June, 1875, was too late.

4th. That such notice of recission was made on Sunday, and was void.

Which motion the court denied, and to which denial the defendant duly excepted, and his exception was noted and allowed.

Defendant testified in his own behalf, and various depositions on each side were read and oral testimony given inspecting the history of this stock and of the defendant's purchase thereof, the time when purchased and for what price, and concerning the alleged repudiation of the contract at the mines in June, 1875, and subsequent conversations and statements of the parties relatory to the transaction, and which are not here set out, as they are not deemed material to the rulings on questions of law to which exceptions were taken and allowed.

The court then among other instructions gave the jury the following upon the issue of agency:

"You must take the letters and telegrams and all of them *and*

72 *all of them*, and looking at these in the light of the previous relations of the parties, of what each of the writers knew, placing yourself in the writer's place and situation in order better to ascertain

their meaning and purpose, and in the light shed upon the questions of fact by these letters and telegrams, by the history of the whole transaction, you must determine whether the defendant did undertake to act as the plaintiff's agent for the purchase of stock from others."

To which instruction and every part thereof the defendant duly excepted, and his exceptions were noted.

The court also, at plaintiff's request, instructed the jury as follows in regard to the letter of January 8th, 1875:

"It were not enough to charge the plaintiff with knowledge of the mal-character of the transaction; that the language used was such as might have caused some persons to suspect it. He might, in view of previous friendly relations, have no suspicion of bad faith, and might naturally regard expressions as inaccurately used rather than put upon them a construction which would show bad faith on the part of defendant, which he had no reason to anticipate."

To which instruction and every part of which the defendant duly excepted, and his exceptions were noted.

The court further charged the jury, at the request of the plaintiff, as follows:

73 "Before the plaintiff was required to affirm or rescind the contract, he must be shown to have had actual knowledge of the imposition practiced upon him. It is not enough to show that he might have known or suspected it from data within his reach."

To which instruction and to every part of which the defendant duly excepted, and his exception was noted and allowed.

The court farther charged the jury, at the request of the plaintiff, as follows:

"If the jury believe that the plaintiff had no actual knowledge or belief that defendant had put his own stock upon them, until June, 1875, at the mine, then his repudiation of the transaction, if made then, was sufficient."

To which instruction and to every part of which the defendant duly excepted, and his exception was noted and allowed.

The foregoing exhibits all of the instructions given so far as the same were excepted to by the defendant.

The entire charge of the court was as follows:

Charge.

Minnesota circuit, June 1st, 1876.

ROB'T LANGDON }
vs.
JOHN W. PENCE. }

GENTLEMEN OF THE JURY:

74 1. The first and main question is whether the defendant undertook to act as the plaintiff's agent in the purchase of stock from others. The plaintiff affirms it. The defendant denies it. The plaintiff insists that his purpose and understanding was that the defendant should act for him in buying stock from others. The defendant insists that his understanding and purpose was, and that the plaintiff so understood it from the beginning and all along, that the defendant was selling his own stock.

In deciding this question of fact you must take the letters and telegrams and all of them, and looking at them in the light of the previous relations of the parties and of what each of the writers knew, placing yourselves in the writers' place and situation in order better to ascertain their meaning and purpose, and in the light shed upon this question of fact by these letters and telegrams, and by the history of the whole transaction, you must determine whether the defendant did undertake to act as the plaintiff's agent for the purchase of stock from others. If he did, he could not sell his own stock to the plaintiff without the plaintiff's consent thereto; and if, being agent to buy, he did sell his own stock, the plaintiff can recover, if, when he became aware of it he repudiated the transaction and never assented to it.

But if it was understood by the plaintiff at the time of the transaction of purchase that the defendant had sold the plaintiff his, defendant's, own stock, then it is admitted that the plaintiff has no cause of action and cannot recover.

75 2. If the defendant undertook to act as plaintiff's agent to buy stock of others, he would have no right to sell his own stock without apprising the plaintiff thereof. If the defendant undertook to act as plaintiff's agent to buy, the defendant's duty, if he transferred or undertook to transer his own stock, would be to communicate that fact in plain terms to the plaintiff. If he did thus communicate it, the plaintiff would have the election to affirm or repudiate the transaction. If once affirmed by plaintiff with knowledge of the facts, he could not afterwards repudiate the transaction.

3. Defendant claims that the plaintiff has since ratified the purchase.

1st. He claims that the letter of the defendant to the plaintiff of January 8th, 1875, and the bill of sale and of receipt for the stock viewed in the light of what each party knew, did advise the plaintiff that the stock bought was the defendant's own stock, and that the plaintiff made no objection thereto until June following, when he learned that the mines would not pay.

The plaintiff testifies that he did not so understand the correspondence and bill of sale, and that he first knew that defendant had sold his own stock in June, 1875, when he visited the mines, and he does not claim to have repudiated the transaction before that time. When the plaintiff first became aware that the defendant had sold his own stock is a question for the jury to decide from all the circumstances.

76 2d. Defendant claims, also, that after the plaintiff visited the mines and knew all about the purchase, he ratified the purchase and assented to contracts and arrangements looking to the further operation and working of the mine.

On the contrary, the plaintiff claims that as soon as he learned, which was on his visit to the mines in June, 1875, that the defendant had sold his own stock, he and his associates at once repudiated the transaction, and refused to have anything to do with the mines, and so notified the defendant. This is also a question of fact for you to decide upon the whole evidence and all the circumstances.

4. Recapitulation.

1. If the plaintiff understood from the beginning, or understood at and from the time he received the letter of the defendant of January 8th, 1875, which enclosed the bill of sale and receipt, that the defendant had sold him his own stock, and assented to it, or did not object to it within a reasonable time, then the plaintiff cannot recover.

2. But if the defendant undertook to act as agent for the plaintiff to

buy stock for him, and sold his own and did not plainly communicate the fact that it was his own stock he had transferred, the plaintiff would have the right to repudiate the purchase down to the time he became aware of the fact. When advised of the fact plaintiff could stand to or reject the transaction.

If, after being advised, the plaintiff affirmed it at the mines in June, 1875, he cannot recover. But if he was first advised of it at the
77 mines and then repudiated it, this is a sufficient repudiation, and the plaintiff is entitled to recover the price paid for the stock (irrespective of the value of the stock or the question of actual or intentional fraud), if you find that the defendant was the agent of the plaintiff and undertook to act as such agent of the plaintiff in the purchase of stock in the said mining company.

JOHN F. DILLON,
Judge.

(Endorsed :) U. S. circuit court, district of Minnesota. Robert B. Langdon vs. John W. Pence. Charge to jury. Filed June 23d, 1876. H. E. Mann, clerk.

The instructions given at the instance of the plaintiff, so far as the same were excepted to, appear above. The requests of the plaintiff were as follows, which were given or refused as shown on the margin :

U. S. circuit court, district of Minnesota.

ROBERT B. LANGDON }
vs.
JOHN W. PENCE. }

Counsel for plaintiff ask the court to charge the jury :

1. In considering the letters and telegrams that passed between
78 the parties, that construction should be placed on each which the writer had good reason to suspect would be placed on it by the person receiving it, in view of his understanding (known to the writer) of the subject-matter of the communication.

Given.

2. That the letter of def't of Dec. 17th, 1874, in reply to plaintiff's letter of Dec. 10th, 1874, was an offer by def't to act as plaintiff's agent in the purchase of mining stock from some other person or persons. (This would be so standing alone, but the meaning of that letter is for the jury to construe in the light of the relations of the parties and the other letters, telegrams, and circumstances in the case.)

Given in connection with court's charge.

3. That the correspondence by letter and telegraph between plaintiff and defendant up to and including the remittance by plaintiff of the draft for the purchase of the stock, authorized the plaintiff to believe, and shows that the plaintiff did believe, that defendant was acting as his agent and in his sole interest in the purchase for him of the 7,500 shares of mining stock, and that defendant must be held to have acted in that purchase as plaintiff's agent.

Refused, except as given in court's charge.

4. That if defendant assumed to act as the plaintiff's agent in the purchase of the stock from others, he had no right to buy from himself stock for the plaintiff without plaintiff's knowledge. Such a transmission would be a breach of duty, and such a sale would be subject to re-

scission by plaintiff when it came to his knowledge irrespective of any question of intentional fraud or actual injury.

Given.

79 5. In such case the purchaser would be entitled to a reasonable time after the facts came to his knowledge to examine for himself the character and value of the property purchased to determine whether he should ratify or rescind the purchase—that is, in a case where the purchaser had no personal knowledge of the character or value of the property and the agent's judgment and representations had alone been relied on in making the purchase.

Given.

6. If the jury believe that the defendant before the transaction with the plaintiff had entered into an executory contract with Hill Beechy to sell him 7,500 shares of this stock, but that the consideration had not been paid nor the stock separated, identified, set apart, or delivered, it would still be defendant's stock, and he would have no right by vacating his bargain to Bechy to sell his stock to plaintiff if acting as plaintiff's agent in the purchase, without apprising the plaintiff thereof. As soon as Beechy's bargain was given up, the defendant's title to the stock was clear and disembarrassed and he had no more right to sell that stock to his principal than any other without apprising him thereof; that is, that it was defendant's own stock.

Given.

7. The evidence shows that when the money was sent by plaintiff to close the purchase he believed and had a right to believe that defendant was acting as his agent in purchasing the stock from some other person whose name was not disclosed. Pence must then have

80 expected that his letter of 8th of January, 1875, and account enclosed would naturally be construed by the plaintiff to accord with this view, and if the jury believe that it was so construed by the plaintiff and his partner, Shepard, then it was not notice to the plaintiff that Pence had put off on plaintiff his own stock.

Refused.

8. It was not enough to charge plaintiff with knowledge of the real character of the transaction; that the language used was such as might have caused some persons to suspect it. He might, in view of previous friendly relations, have no suspicions of bad faith, and might naturally regard expressions as inaccurately used rather than put on them a construction which would show bad faith on the part of def't, which he had no reason to anticipate.

Given.

9. Before the plaintiff was required to rescind or affirm the contract he must be shown to have had actual knowledge of the imposition practiced upon him. It is not enough to show that he might have known or suspected it from data within his reach.

Given.

10. If the jury believe that the plaintiff had no actual knowledge or belief that defendant had put his own stock upon him until June, 1875, at the mine, then his repudiation of the transaction, if made then, was sufficient.

Given.

81 11. If defendant at the mine understood that Shepard and Linton were interested with plaintiff in this stock, then repudiation by Shepard in the presence and with the consent of all would be equivalent to a repudiation by plaintiff in person.

Given.

12. If the jury find that at the very time when the defendant, pretending to act as pu'chasing agent of plaintiff, was selling him his own stock, he was purchasing of other persons other stock in the same mine at a less price, this is evidence of intentional fraud on the part of defendant.

Refused.

13. The law requires disinter'edness and good faith on the part of an agent, and will not allow him to profit in his dealings by imposing on his principal.

Given.

(Endorsed:) U. S. circuit court. R. B. Langdon vs. John W. Pence. Plaintiff's requests.

The jury found a verdict in favor of the plaintiff, and assessed his damages at the sum of $10,387.45.

Whereupon the defendant prayed for a bill of exceptions, and gave notice of a motion for a new trial upon the ground of errors of law committed during the trial and duly excepted to by him.

82 And whereas none of the aforesaid matters as yet appear of record, the above bill of exception is duly allowed, signed, and sealed, during the term, this 27 day of July, A. D. 1876.

JOHN F. DILLON, [SEAL.]
U. S. Circuit Court Judge.

(Endorsed:) U. S. circuit court, Minnesota. 2008. Robert B. Langdon vs. John W. Pence. Bill of exceptions.

Service of the within by copy admitted, July 15, 1876.

LOCHREN, MCNAIR AND GILFILLAN,
Att'ys for Plaintiff.

83 Supreme Court of the United States.

JOHN W. PENCE, PLAINTIFF IN ERROR,
vs.
ROBERT B. LANGDON, DEFENDANT IN ERROR.

Know all men by these presents that we, John W. Pence, of San Francisco, California, Peter Wolford and W. J. Van Dyke, of Minneapolis, Minnesota, are held and firmly bound unto Robert B. Langdon in the sum of twenty-one thousand dollars, lawful money of the United States, to be paid to the said Robert B. Langdon, his executors or administrators, to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents, sealed with our seals and dated this eleventh day of August, A. D. 1876.

Whereas the above-named John W. Pence has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the district of Minnesota:

Now, therefore, the condition of this obligation is such that if the above-named John W. Pence shall prosecute his said writ of error to effect, and answer all costs and damages if he shall fail to make

84 good his plea, then this obligation to be void; otherwise to remain in full force and virtue.

JOHN W. PENCE. [SEAL.]
PETER WOLFORD. [SEAL.]
W. J. VAN DYKE. [SEAL.]

Signed, sealed, and delivered in presence of—
THO'S J. BUXTON.
BUDD REEVE.

STATE OF MINNESOTA,
County of Hennepin, ss:

Be it known that on the 11th day of August, A. D. 1876, came before me personally John W. Pence, Peter Woolford, and W. J. Van Dyke, of Minneapolis, to me well known to be the same persons who executed the foregoing bond, and each severally acknowledged the same to be his own free act and deed.

[SEAL.] BUDD REEVE,
U. S. Commissioner Circuit Court, District of Minnesota.

STATE OF MINNESOTA,
County of Hennepin, ss:

Peter Wolford and W. J. Van Dyke upon oath doth say, each for himself, that he is one of the sureties above named; that he is a resident and freeholder of and in the State of Minnesota, and worth the amount of twenty-one thousand dollars, specified in the foregoing
85 bond, above his debts and liabilities and exclusive of his property which is exempt from execution.

PETER WOLFORD.
W. J. VAN DYKE.

Subscribed and sworn to before me on this 11th day of August, A. D. 1876.

[SEAL.] BUDD REEVE,
U. S. Commissioner Circuit Court, District of Minnesota.

(Indorsed:) United States Supreme Court. John W. Pence, plaintiff in error, vs. Robert B. Langdon, defendant in error. Bond on writ of error and for supersedeas.

The within bond is approved and writ of error allowed.

R. R. NELSON, *Judge.*

Filed August 12, 1876.

H. E. MANN, *Clerk.*

86 United States Supreme Court.

JOHN W. PENCE, PLAINTIFF IN ERROR,
vs.
ROBERT B. LANGDON, DEFENDANT IN ERROR.

To Lochren, McNair & Gilfillan, attorneys for defendant in error:

You will take notice that a writ of error in this action has been served upon you by lodging a copy thereof for the defendant in error in the office of the clerk of the United States circuit court for the district of Minnesota, and that the plaintiff in error, for the purpose of making the

said writ of error a supersedeas, and to stay process on the judgment, have given the security required by law.

SHAW & LEVI,
C. K. DAVIS,
Attorneys for Plaintiff in Error.

(Indorsed:) U. S. Supreme Court. John W. Pence, plaintiff in error, vs. Robert W. Langdon, defendant in error. Notice of filing writ and security.

87 Service admitted this 14th day of August, A. D. 1875.
LOCHREN, McNAIR & GILFILLAN,
Attorneys for Def't in Error.
R. B. LANGDON, *Def't in Error.*

88 UNITED STATES OF AMERICA:

Circuit court of the United States, district of Minnesota, ss:

I, H. E. Mann, clerk of said circuit court for the district of Minnesota, do hereby certify and return to the honorable the Supreme Court of the United States that the foregoing is a true and complete transcript of the records, process, pleadings, orders, final judgment, and all other proceedings in said cause, and of the whole thereof, as appears from the original records and files of said court; and I further certify and return that I have annexed to said transcript, and do hereby transmit therewith, the original citation, together with the proof of the service thereof, all contained in 88 consecutive pages, & marked from 1 to 88.

In testimony whereof I have hereunto set my hand and affixed the seal of the said circuit court at S't Paul, in the district aforesaid, this twenty-third day of September, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the one hundred and first year.

[SEAL.] H. E. MANN, *Clerk.*

89 Supreme Court of the United States. of the October term, in the year of our Lord eighteen hundred and seventy-six.

JOHN W. PENCE, PLAINTITF IN ERROR,
vs.
ROBERT B. LANGDON, DEFENDANT IN ERROR.

Afterwards, to wit, on the second Monday of October, in the year of our Lord one thousand eight hundred and seventy-six, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said John W. Pence, by Shaw & Levi and C. K. Davis, his attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

That the court erred—

First. In overruling the objections of the said plaintiff in error to the proof offered by the plaintiff in the court below, that Pence sold him his own note, or to any further proof in the case, upon the grounds—

1. That it being admitted, as was the fact, that the letters and telegrams set forth in the bill of exceptions were the only evidence of any agency, the same failed to establish any agency.

90 2. That the letter from Pence to Langdon of January 8, 1875, and the account rendered and receipt sent therewith, were a distinct notification that the stock which Pence sold to Langdon was Pence's stock, or at least were sufficient to put the plaintiff upon inquiry as to the fact.

Second. In admitting testimony against the objection of the plaintiff in error that Langdon, Shepard, and Linton did not know that the stock sold was defendant's own stock until they visited the mine, about June 20th, 1875, upon the ground that the letters and telegrams set forth in the bill of exceptions controlled and conclusively determined the rights of the parties, and show—

1. That Pence was not Langdon's agent in the transaction.

2. And even if he were, that the letter of January 8th, 1875, from Pence to Langdon, and the account of sale of the stock, and the receipt accompanying the same, were a distinct notification to Langdon that the stock sold to him was Pence's stock, or at least were sufficient to put Langdon upon inquiry as to that fact.

91 Third. In refusing, when the plaintiff rested his case, to charge the jury, as requested by the plaintiff in error, to bring in a verdict for the defendant, for the reasons above stated, and for the further reason that the notice of rescission given by Langdon to Pence of the contract of sale of said stock appears by the bill of exceptions to have been given on Sunday, and is therefore void.

Fourth. The court erred in its instruction upon the question of agency in allowing the jury to determine from the letters and telegrams set forth in the bill of exceptions whether Pence did undertake to act as Langdon's agent for the purchase of stock from others, for the following reasons:

1. That it is averred in the complaint that Pence undertook in writing to act as such agent for Langdon.

2. That it appears from the bill of exceptions that the letters and telegrams therein set forth were the only testimony offered or admitted upon the issue of agency, and that the same fail to prove any agency.

3. For the further reasons hereinbefore set forth in the first, second, and third assignment of errors.

92 Fifth. In charging the jury in reference to the letter of Jan. 8th, 1875, at plaintiff's request, that "it was not enough to charge plaintiff with knowledge of the real character of the transaction; that the language used was such as might have caused some persons to suspect it. He might, in view of previous friendly relations, have no suspicion of bad faith, and might naturally regard expressions as inaccurately used rather than put upon them a construction which would show bad faith upon the part of defendant, which he had no reason to anticipate."

Sixth. In charging the jury, at the request of the plaintiff, "before the plaintiff was required to affirm or rescind the contract he must be shown to have had actual knowledge of the imposition practiced upon him. It is not enough to show that he might have known or suspected it from data within his reach."

Seventh. In charging the jury, at plaintiff's request, "If the jury believe that the plaintiff have no actual knowledge or belief that defendant had put his own stock upon him until June, 1875, at the mine, then his repudiation of the transaction, if made then, was sufficient."

93 And the said John W. Pence prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that he may restored to all things which he hath lost by occasion of the said judgment.

SHAW & LEVI,
C. K. DAVIS,
Attorneys for Plaintiff in Error.

(Indorsed:) United States Supreme Court. John W. Pence, plaintiff in error, v. Robert B. Langdon, defendant in error. Assignment of errors. Filed Aug. 12, 1876. H. E. Mann, clerk. Shaw & Levi, C. K. Davis, att'ys for pl'ff in error.

(Indorsed:) United States circuit court, district of Minnesota. Robert B. Langdon vs. John W. Pence. Return to writ of error.

(Indorsement on cover:) No. 194. John W. Pence, plaintiff in error, vs. Robert B. Langdon. Minesota C. C. U. S. Filed 6th October, 1876.

IN THE SUPREME COURT

OF THE

UNITED STATES.

NUMBER 194.

JOHN W. PENCE, *Plaintiff in Error.*

vs.

ROBERT B. LANGDON, *Defendant in Error.*

ARGUMENT FOR PLAINTIFF IN ERROR.

C. K. DAVIS,
Counsel for Plaintiff in Error.

Ramaley & Cunningham, Printers, St. Paul.

In The Supreme Court

OF THE

UNITED STATES.

OCTOBER TERM, 1878.

Supreme Court of the United States, No. 194.

JOHN W. PENCE, *Plaintiff in Error.*

ROBERT B. LANGDON, *Defendant in Error.*

I.

Statement.

Langdon brought this action against Pence in the Circuit Court of the United States, for the district of Minnesota, seeking to recover the sum of $9,425.29 upon allegations in his complaint, of which the substance is, that in December 17, 1874, Pence, then being in San Francisco, California, and engaged in mining for gold in that State and in Nevada, represented by letter to the plaintiff, who lived and was in Minneapolis, Minn., that he was part owner of a very val-

uable gold mine in Nevada, from which large profits would be realized, and that there was for sale one eighth of this mine, represented by 7500 shares of its stock, which could be bought for $8,368.75 in gold, incumbered with an obligation to pay the further sum of $3,125 out of the first net proceeds of the mine, after payment of $20,000 in its improvement; that experienced miners considered that this mine would yield immense profits, that several persons were anxiously endeavoring to purchase said 7500 shares, but that Pence had the refusal for ten days to purchase them on the terms aforesaid, and that *he then and there by said letter offered to act as Langdon's agent* for the purchase of these shares, giving Langdon the benefit of the option, and directing the latter in case he should determine to purchase the shares through Pence's agency, to notify him by telegraph, and remit to him the purchase money in New York exchange.

This letter was received by Langdon at Minneapolis, Dec. 24, 1874, who thereupon enquired of Pence by telegraph whether in case he purchased, he, Pence and one John Watson would have a controlling interest in the mine, to which Pence answered that they would.

That thereupon Langdon, fully believing such representations and relying upon them, and fully believing that Pence had no interest in said 7500 shares, and that he was acting, and would act wholly in his behalf, and as his agent, giving him the benefit of his judgment, knowledge and experience, unbiased by any personal interest, was induced to make and did make such purchase, which he did by notifying Pence to do so, on Dec. 28, 1874, and that he sent Pence a draft for $8,368.75 gold, for which he paid in currency $9,425.27.

That Pence received the draft January 8, 1874, and on that day notified Langdon by letter, that he had purchased the stock in the Owyhee Mining Company, and had deposited it in the National Gold Banking and Trust Company of San Francisco. That each and every of the statements made by Pence to Langdon were false, and with intent to cheat and defraud Langdon; that the mine was of

little or of no value, and that the shares of the stock were worth no more than one-fourth of the purchase money; that no one was endeavoring to purchase the shares, that defendant had no option to purchase them; that he did not act for the plaintiff about the purchase, but, on the contrary, that on December 17th, 1874, the defendant himself, was the owner of these identical shares, and that when he received the draft, he kept the whole amount himself, and made a pretence of transferring the shares from himself to Langdon; that all of his representations were made with intent to cheat and defraud Langdon, and that had the latter known that any of the shares belonged to Pence, he never would have purchased them; that Langdon never had any knowledge or information that Pence was the owner of the shares, or was in any way interested therein, or that he had procured and kept said draft and the money represented thereby, for his own use, or that any of his representations were untrue, until on or about the 20th day of June, 1875, at Elcho, in the State of Nevada, when the plaintiff was informed, for the first time, that Pence had not purchased the shares for the plaintiff, with the avails of the draft, but had kept the draft to his own use, and made the pretended transfer of his own shares to the plaintiff, and that Langdon then notified Pence that he rescinded the pretended purchase of said shares, and should not be bound thereby, and demanded that he pay back the amount of the draft.

It is alleged in the answer that, on the 22d day of July, 1874, Pence and one Baldwin became the owners of thirty thousand ($30,000) shares of stock in said mining company, subject to certain incumbrances, and that said shares of stock constituted one-half of all the stock of the company; that of these shares, the defendant owned twenty two thousand five hundred (22,500) and Baldwin seven thousand five hundred (7,500) shares, and that on the 27th day of November, 1874, defendant sold seven thousand five hundred (7,500) of his shares to John Watson, at the cost price, interest at twelve (12) per cent. added, and subject, proportion-

ately, to the incumbrances; that on the 10th day of December, 1874, Langdon, without any solicitation or inducement of Pence, wrote from Minneapolis to the defendant at San Francisco, a letter inquiring what arrangements could be made whereby Langdon could get an interest in said mining stock and business, which letter was received about the 17th day of December, 1874; that before the receipt of the letter, the defendant had agreed to sell one Hill Beechy seven thousand five hundred (7,500) shares of his mining stock for $8.368.75 in gold: that this sale had not been completed on the receipt of the letter of December 10th, and the defendant then informed Beechy that the plaintiff would like perhaps, to purchase the said seven thousand five hundred (7,500) shares bargained to Beechy, and requested Beechy to give him, the defendant, the refusal for ten days, to rescind that agreement, or take back the stock at the same price as he had agreed to pay, in order that the defendant might, in case the plaintiff should desire to purchase, sell the same to plaintiff; to which request Beechy agreed, upon certain conditions. That thereupon the defendant wrote to plaintiff the letter of December 17th, 1874, and received the telegram of December 26th, 1874, and answered by the telegram of December 26th, 1874, and received the letter of December 28th, 1874, and on the 18th day of January, 1875, sent to plaintiff a bill or memorandum of sale and receipt, (all of which writings appear in the bill of exceptions) that the plaintiff received the bill of sale and receipt by letter, in due course of mail, and accepted and was entirely satisfied with the sale and the terms of the sale until a long time thereafter.

The answer denies that Pence made any fradulent representations to the plaintiff, or that he ever acted as his agent, or that the plaintiff ever understood that he was acting as his agent, but that the plaintiff well knew during the negotiations, at the time of the purchasing and sending the draft, and receiving the bill of sale, that he was buying the seventy-five hundred (7500) shares of stock direct from the defendant. The defendant alleges that, after the purchase, the

working and operation of the mine was commenced and carried on during the spring and summer of 1875, by the owners of the stock, including the plaintiff; that on or about the 20th day of June, 1875, the plaintiff, with Shepard and Linton, who were interested with him in the purchase of the stock, visited the mine and ascertained the result of the operations to that time, when it was discovered for the first time, by all persons, including the defendant, that the mine would not probably yield so large profits as had been anticipated, and that thereupon for the first time, plaintiff attempted to find fault and complain about the sale of the stock to him; that he never complained before, and that the only reason why the plaintiff sought to rescind the sale, was that he was disappointed as to the result of the speculation.

From the bill of exceptions which begins upon page 26 of the record, it appears, that to sustain the proof of issues on his part, the plaintiff offered the correspondence set forth on pages 26, 27, 28, 29, and 30 of the record. These letters and telegrams were the only evidence offered to establish the agency set up in the complaint. (See Folios 68 and 70 of the record.) After they had been introduced, the plaintiff proposed to prove by his own testimony that the defendant sold him his, defendant's, own stock, to which proof, or to any further testimony in the case, the defendant objected upon the grounds, *first:* that it being admitted, as was the fact, that the said letters and telegrams were the only evidence of any agency, the same failed to establish any such agency. *Second:* that the letters from Pence to Langdon of January 8th, 1875, and the account rendered, and the receipt sent therewith were a distinct notification that the stock which the defendant sold to the plaintiff was his, defendant's stock, or at least were sufficient to put the plaintiff upon enquiry as to that fact. The court overruled the objection, and to that ruling the defendant excepted. It appears from the bill of exceptions (folio 69) that Langdon, Shepard and Linton, received the various letters and telegrams above referred to, as well as the letter of January 8th, 1875, and the bill rendered

and the receipt which accompanied the same at or about the time when the same were respectively received, which was by due course of mail, and that the letter of January 8th was received by the plaintiff sometime that month. It appeared that the plaintiff with Shepard and Linton visited the mines for purposes of inspecting its workings, arriving there about June 20th, 1875—on Saturday, and that, on the next day, to-wit: on Sunday, notified the defendant, for the first time, that he should not hold himself bound by the contract, for the reason that the defendant had sold him his, defendant's, own stock, and repudiated and disaffirmed the same. It appears that this was the only notification ever given to that effect. Testimony was offered by the plaintiff (folio 79) that he did not know that the stock sold, was defendant's own stock, until the visit to the mines. To this testimony the defendant objected because the letters and telegrams controlled and conclusively determined the relations of the parties; which objection was overruled, the defendant excepting, and the testimony was received. And no other testimony to establish the agency or notification of rescission was received. The plaintiff then rested, and the defendant (folio 71) moved the court to instruct the jury to bring in a verdict for the defendant, for the following reasons :

First.—That no agency had been proved.

Second.—That the letter of January 8th, 1875, from Pence to Langdon, and the account of sale, and the receipt accompanying the same, were a distinct notification to the plaintiff that the defendant had sold him his, defendant's own stock, or at least were sufficient to put the plaintiff on inquiry as to that fact.

Third.—That the notice of rescission of the contract made at the mine in June, 1875, was too late.

Fourth.—That such notice of rescission was made on Sun-

day and was void. Which motion the court denied, and to which denial the defendant excepted. The court in submitting the case to the jury, charged as follows, (folio 72):

"You must take the letters and telegrams and all of them, and looking at these in the light of the previous relations of the parties, what each of the writers knew, placing yourself in the writer's place and situation, in order better to ascertain their meaning and purpose, and in the light shed upon the questions of fact by those letters and telegrams, by the history of the whole transaction, you must determine whether the defendant did undertake to act as the plaintiff's agent for the purchase of stock from others."

To which instruction, and every part thereof, the defendant duly excepted. The court also, at the plaintiff's request, instructed the jury as follows in regard to the letter of January 8th, 1875, (folio 72):

"It were not enough to charge the plaintiff with knowledge of the real character of the transaction, that the language used was such as might have caused some persons to suspect it. He might, in view of previous friendly relations, have no suspicion of bad faith, and might naturally regard expressions as inaccurately used rather than put upon them a construction which would show bad faith on the part of defendant, which he had no reason to anticipate."

To which instruction the defendant duly excepted. The court further charged the jury, at request of the plaintiff, as follows, (folio 73):

"Before the plaintiff was required to affirm or rescind the contract, he must be shown to have had actual knowledge of the imposition practiced upon him. It is not enough to show that he might have known or suspected it from data within his reach."

To which instruction the defendant excepted.

The court further charged the jury, at the request of the plaintiff, as follows (folio 73):

"If the jury believe that the plaintiff had no actual knowledge or belief that the defendant had put his own stock upon him, until June, 1875, at the mine, then his repudiation of the transaction, if made then, was sufficient."

To which instruction the defendant excepted.

It appears from the charge of the court, page 32, that the plaintiff's right to recover, was made to depend wholly upon the question whether the relation of principal and agent existed between the parties, and that no other issue of fraud was submitted to the jury for their consideration. The jury found a verdict for the plaintiff for $10,387,45. A bill of exceptions was allowed, a new trial was denied, and judgment was entered against defendant(page 25).

ERRORS ASSIGNED.

The court erred,

First. In overruling the objections of the said plaintiff in error to the proof offered by the plaintiff in the court below, that Pence sold him his own stock, or to any further proof in the case, upon the grounds—

1. That it being admitted, as was the fact, that the letters and telegrams set forth in the bill of exceptions were the only evidence of any agency, the same failed to establish any agency.

2. That the letter from Pence to Langdon of January 8, 1875, and the account rendered and receipt sent therewith, were a distinct notification that the stock which Pence sold to Langdon was Pence's stock, or at least were sufficient to put the plaintiff upon inquiry as to the fact.

Second. In admitting testimony against the objection of the plaintiff in error, that Langdon, Shepard and Linton did not know that the stock sold was defendant's own stock until they visited the mine, about June 20th, 1875, upon the ground that the letters and telegrams set forth in the bill of exceptions. controlled and conclusively determined the rights of the parties, and show—

1. That Pence was not Langdon's agent in the transaction.

2. And even if he were, that the letter of January 8th, 1875, from Pence to Langdon, and the account of sale of the stock, and the receipt accompanying the same, were a distinct notification to Langdon that the stock sold to him was Pence's stock, or at least were sufficient to put Langdon upon inquiry as to that fact.

Third. In refusing, when the plaintiff rested his case, to charge the jury, as requested by the plaintiff in error, to bring in a verdict for the defendant, for the reasons above stated, and for the further reason that the notice of rescission given by Langdon to Pence of the contract of sale of said stock, appears by the bill of exceptions to have been given on Sunday, and is therefore void.

Fourth. The court erred in its instruction upon the question of agency, in allowing the jury to determine from the letters and telegrams set forth in the bill of exceptions, whether Pence did undertake to act as Langdon's agent for the purchase of stock from others, for the following reasons:

1. That it is averred in the complaint that Pence undertook in writing to act as such agent for Langdon.

2. That it appears from the bill of exceptions that the letters and telegrams therein set forth were the only testimony offered or admitted upon the issue of agency, and that the same fail to prove any agency.

3. For the further reasons hereinbefore set forth in the first, second and third assignments of errors.

Fifth. In charging the jury in reference to the letter of January 8th, 1875, at plaintiff's request, that "it was not enough to charge plaintiff with knowledge of the real character of the transaction; that the language used was such as might have caused some persons to suspect it. He might, in view of previous friendly relations, have no suspicion of bad faith, and might naturally regard expressions as inac-

curately used, rather than put upon them a construction which would show bad faith upon the part of defendant, which he had no reason to anticipate."

Sixth. In charging the jury at the request of the plaintiff, "before the plaintiff was required to affirm or rescind the contract, he must be shown to have had actual knowledge of the imposition practiced upon him. It is not enough to show that he might have known or suspected it from data within his reach."

Seventh. In charging the jury at plaintiff's request, "If the jury believe that the plaintiff had no actual knowledge or belief that the defendant had put his own stock upon him until June, 1875, at the mine, then his repudiation of the transaction, if made then, was sufficient."

POINTS OF LAW AND FACT.

There are five propositions into which the various errors assigned can be resolved:

First.—The court should not have submitted the letters and telegrams to the jury for its determination whether Pence acted or undertook to act as Langdon's agent, but should have ruled upon that question as a matter of law, that no agency was established by the proof.

Second.—That whether or not Pence was Langdon's agent, the letter of January 8, 1875, and account of stock and receipt rendered therewith, were a distinct notification to Langdon that Pence had sold to him his, Pence's stock, The acquiesence by Langdon in the transaction until June, 1875, deprived him of the right to rescind.

Third.—That a knowledge of facts which irresistibly suggested inquiry was sufficient to require Langdon to rescind at once, and imposes the same duty as actual knowledge.

Fourth.—Langdon should have placed Pence in *statu quo* by surrendering back the stock, or by an assignment of the right to the stock, which the transaction had vested in him.

Fifth.—That the notice of rescission is null because it was given on Sunday.

I.

The court should not have submitted to the jury for its determination from the written evidence the issue whether those writings established the relation of agency, but should have ruled upon that question as a matter of law, that no agency was established by the proof.

Unless Pence was found to have offered to act and acted as Langdon's agent, he was entitled to a verdict. The complaint (folio 9, *et seq.*, p. 4,) distinctly avers that the relation between the parties, whatever it was, was constituted by writing. The bill of exceptions, (p. 26, *et seq.*) sets forth these writings by their tenor. They were the only evidence offered to establish the allegation of agency, (p. 30, fol. 68, 69; p. 31, fol. 70, 72).

This being the fact the court erred in admitting testimony as to other issues after these writings were all in evidence, (p. 30, fol. 68, 69).

It also erred in refusing to instruct the jury to find for the defendant, for the reason that no agency had been proved, (p. 31, fol. 70, 71).

Turner vs. Yates, 16 *How.* 14. *Hutchinson vs. Bowker*, 5 *M. & W.*, 534. *Etting vs. The Bank*, 11 *Wheat.* 59. *Greenleaf vs. Birth*, 9 *Peters*, 292. *Sweeny vs. Easton*, 1 *Wall.*, 166. *U. S. vs. Carlton*, 1 *Gallison*, 399. *Nason vs. U. S., Id.*, 53. *Blivins vs. N. E. Screw Co.*, 23 *How.* 420. *Van Eman vs. Stanchfield et al.*, 8 *Minn.*, 518. *Luckhart vs. Ogden*, 30 *Cal.*, 548. *Ranney vs. Higby*, 5 *Wis.*, 62. *Matteson vs. Schofield*, 27 *Wis.*, 671. *Wells vs. Railway Co.*, 30 *Wis.*, 605. *Van Valkenburg vs. Rogers*, 18 *Mich.*, 180. *U. S. vs. Shaw*, 1 *Cliff.*, 317. *Woodman vs. Chesley*, 39 *Me.*, 45. *Eyser vs. Weissgerber*, 2 *Iowa.*, 463.

The principle to be deduced from these cases, and particularly from the federal decisions, is expressed in *U. S. vs. Shaw*, 1 *Cliff., p.* 321.

"It is the duty of the court to construe written instruments, and that principle is not affected by the fact that the instruments consist of written correspondence extending over a considerable length of time, or that it may embrace a great variety of circumstances. If a contract is to be sought in such a correspondence or if the discharge of a right or obligation is to be deduced from it, the duty must be performed by the court and not by the jury."

It is doubtless true that when a contract is to be gathered from a commercial correspondence which refers to material extraneous facts, or only shows a part of a course of dealing between the parties, it is sometimes necessary to leave the meaning and effect of the letters, in connection with the other evidence, to the jury. *Per cur. Turner vs. Yates*, 16 *Peters*, 23. But this was not such a case.

The complaint avers that the agency which it asserts was constituted by writings. The bill of exceptions shows that the writings were the only proof offered to establish the agency.

The letters and telegrams fail to establish the relation of agency. They are as follows :

MINNEAPOLIS, MINN. *Dec.* 10*th*, 1874.

J. W. PENCE, Esq.,
San Francisco, California:

DEAR SIR, I have had a talk with Mr. Watson about your Nevada mining business, and it looks to me all right. He wishes me to write you and see what arrangments could be made about getting into or buying out the old claimants. If anything can be done that will be satisfactory to all parties let me know. Money close, as usual.

Yours, truly,

R. B. LANGDON.

SAN FRANCISCO, *Dec.* 17*th*, 1874.

R. B. LANGDON, ESQ.
Minneapolis, Minn.:

DEAR SIR : Your letter of the 10th inst. I received this morning. I was glad to hear from you, and would like to

have you join Mr. Watson and myself in gold mining. In answer to your question, I will say that there is an eighth (that is 7,500 shares) that can be bought, if taken at once, at the same I paid and the same that Watson paid, after looking over and prospecting for five weeks. The price is $8,125 and interest on same 4 mo., $243.75: total per cash payment $8,368.75 gold; and then we have to pay $3,125.00 out of the first net proceeds from mine; that is, after we pay about $20,000 for expenses, then we pay as above. The work done on ditch pipe, and improvement amounts to $20,000, but I think we can pay that in one month's work, or less. Should you conclude to buy this stock, you must telegraph me here on receipt of this letter; then you can pay in New York exchange by adding the price of gold to the amount of above cash payment. Or you can send me half or more of the cash if convenient, and a note at sixty days, payable here, for the balance of cash payment, at 12 per cent. interest in gold for interest, and I can fix it.

The $3,125 requires no note but a contract to pay, or due bill payable when made out of dividends, without interest. There are several persons after this stock, but I have the refusal for ten days. If money was a little easier I would take it all, but then I am satisfied I will get all I will want anyway, as old miners all say we have a good mine and must pay immensely. Then there is other mines that we can take in when we get a good start. This will put you on the ground floor with us, or better than I am, as I have spent about $600 to find this mine, prospect it, and have title looked up, &c., &c. Our title is all O. K. Hoping to hear from you very soon, I am,

Yours, respectfully,

J. W. PENCE.

SAINT PAUL, MINN., *Dec. 26th*, 1874.

To J. W. PENCE, ESQ.,

Will take it and send draft at once, if it gives our party control of the mines. Answer.

R. B. LANGDON.

SAN FRANCISCO, CAL., *Dec.* 26, 1874.

R. B. LANGDON,

Minneapolis, Minn.:

Send draft. We have controlling stock interest; that means business.

J. W. PENCE.

MINNEAPOLIS, MINN., *Dec. 28th*, 1874.

J. W. PENCE, ESQ.,
San Francisco, Cal.:

DEAR SIR: Enclosed you will find draft on N. Y., for $8,368.75 in gold, payable to your order.

Your telegram was received in good time. Write me particulars in your next.

Yours, truly,

R. B. LANGDON.

MINNEAPOLIS, MINN., *Dec. 28th*, 1874.

J. W. PENCE,
Occidental Hotel, San Francisco, Cal.:

Have forwarded draft.

R. B. LANGDON.

SAN FRANCISCO, *Jan. 8th*, 1875.

HON. R. B. LANGDON,
Minneapolis, Minn.:

DEAR SIR; Your letter of Dec. 28th, 1874. I received, containing a sight gold draft on Nat. Park Bank, N. Y., for 8,368.15 dollars, which your act. has credit for, and enclosed please find bill and receipt. There have been not less than ½ doz. after the 7.500 *shares of stock I sold you*, and all were astonished to find themselves too late, and still more astonished when I told them there is no more to be had at present, as we have the controlling interest, and propose to run the mine as we think best. The weather has been fine up at the mines, and if we had been in shape with our reservoir and water we could have run up to the 25th of Dec. I have written Mr. John Watson to come out about the middle of Feb. and look over the mines in this State and see all the late improvements in placer mining, as we want to work our mine in the best possible way. I have several placer mines in view in this State which I want him to examine. I would like to have one or two mines here where we can and could work all winter. There have been some great bargains sold in placer mines here, and no doubt many more left. You can see him when he comes to Minneapolis, and talk it over with him, and if you want to join us in a mine or two here, all right. I tell him to arrange to bring all the money he can get collected, as that is what tells with those having bargains to sell.—There have been millions made here in stocks, mostly in Comstock or Virginia City mines. There are fine chances here to operate in mining stock. All you have to do is to look out and know how it is yourself. In settling up our accounts for expenses, improvement, and spring supplies, which we have bills and vouchers for, we find that they amount to $20,000. That includes interest on this amount up to May.—

This I became personally responsible at the bank for. I thought best to borrow this amount at 1 per cent. a month until we could make it out of the mines, knowing that money matters were and are very close in your city, and exchange on gold high price, but should you and Watson prefer to pay your proportion you can at any time. The stock I have deposited with the Nat Gold Bank and Trust Co., of this city. We have made that bank our treasurer, so it is all safe. The balance on your 7,500 shares of stock is $3,125.00 in gold.—The amount is to be paid out of the first net proceeds your ⅓ of the capital stock is entitled to. Mr. Baldwin, who was the sup't last season, says the mines are worth $1,000,000. He owns ⅓ and says he will not sell his. His stock cost him about $200 and his time more than yours cost you. I think we will clean up our expenses and make a good dividend next spring. I would like to have you come out after roads get good and weather pleasant in the spring. I hope to hear from you when convenient.

Yours, &c.,

JOHN W. PENCE.

This letter enclosed the following:

SAN FRANCISCO, CAL., *Jan. 8th*, 1875.

Hon. R. B. Langdon, Minneapolis, Minn.,

To J. W. Pence, Dr.

	Gold.
To 7,500 shares of stock in Owyhee Water and Gravel Mining Co., Elko County, Nevada, at one hundred and fifty dollars per share, -	$11,250
Interest on $,8125, 4 months, - - -	243 75
	$11,493 75
C'r by cash, gold-draft, N. Y. - - -	8,363 75
Bal. due out of first net proceeds, - -	$ 3,125

On the back of the above was written the following:

SAN FRANCISCO, *Jan. 6th*, 1875.

Rec'd of R. B. Langdon, esq., on the within bill, eight thousand three hundred sixty-eight 75-100 dollars in sight draft on Nat. Park Bank, New York, payable in gold coin.
$8,368.75. J. W. PENCE.

SAN FRANCISCO, CAL., *Feb. 10th.*, 1875.

Hon. R. B. LANGDON,

Minneapolis, Minn.:

DEAR SIR: At my request the trustees of the Owyhee Water and Gravel Mining Company had a meeting yesterday; the following business was transacted. Gen. La Grange and Mr. Pierson resigned as trustees, and M. A. Baldwin resigned as superintendent. We then elected you in place of Gen. La Grange, and John Watson in place of M'r Pierson; John Watson was also elected superintendent. The officers of the co. are J. W. Pence,, R. B. Langdon, John Watson, M. A. Baldwin and Bernard Lande, trustees, with John Watson, superintendent, Bernard Lande, sec'y. This arrangement gives us complete control af the mines, and with John Watson at the front, I think we will soon pay off the debt, and get our money back with big interest. I am well satisfied with the advantages and climate of this Pacific coast. There appears to be no end to the resourses of this country; new mines are being discovered almost every day, and the old ones growing better as they get deeper, with a few exceptions I think we will have plenty of water for a few months in the spring at our mine, as the snow is four feet deep up there. I will expect John Watson here about the last of this month. I see by the papers that you are cross-firing on the Senators to be elected. Col. W'm S. King, I believe, is looking up some fine stock in Canada. I hope to see you out here in the spring. Please write me when convenient.

Very truly yours,

J. W. PENCE.

MINNEAPOLIS, MINN., *March 15th*, 1875.

J, W. PENCE, Esq.:

DEAR SIR: Yours of Feb. 10th is at hand and has been for some time. My matters in the legislature took my time so I hardly thought of anything else. We finally got through all right and in good style as you have seen by the paper; have got a good man for a Senator. Col. W. S. King has not got home but they say he is in Washington. I see that you have reorganized and got control of the mine, and hope we shall be able to go ahead and make the mine pay. I will go over when I hear from you, and Shepard will go with me. Shepard and Linton have taken the stock with me, and if things look well want more. I shall stay there some time and look around. I wish to make our company a strong

one. We have a good deal of snow and more a coming; have had a very cold winter and a good deal of it. Everything all right.

Yours truly,
R. B. LANGDON.

SAN FRANCISCO, *April 13th*, 1875.

R. B. LANGDON, Esq.:

DEAR SIR: Your letter I received some time ago, and have been waiting to hear from John Watson, our sup't; he went to the mines about two weeks ago; the snow was so deep he was compelled to leave his wagon and horses and to go on snow-shoes and afoot for 25 miles. I rec'd a letter from him last evening; he got through in fair shape, but found the snow from 2 to 18 feet deep when he arrived there at camp, which will give us plenty of water and, I think, guarantee us handsome returns; he was getting ready to start cleaning ditches, uncovering the pipe, and putting things in order. The foreman and several hands are with him. He says provisions are very short up there, also wood. We left and arranged enough there last fall to start on this spring, but the excitement and ono thing and another took so many in there last winter, that they ate everything up or nearly so. The roads will be bad for at least one month to come, and I think we had better not go in until the roads are in fair passable condition, and then when we get there will have a chance to get around, and in the time I will try and get in some supplies. I have shipped some for Watson and the miners to live upon until the roads get passable. I will let you know when to come and what to bring with you. I see by your letter that you have taken in Mess'rs Shepard and Linton, which I am perfectly satisfied with, only it makes your interest very small, but as you say, if it proves good you can buy more.

Mr. M. A. Baldwin, who owns ¼, that is, when the debt is paid, came to me a few days ago and said he had found a fine gulch mine and wanted help. I was not prepared to help him, so after trying several days without success, he offered to sell his interest in our mine. He thinks it is worth $5 per share, but finally said he would take costs and interest same as you paid. I thought then of you and your firm wanting more, but as you had never seen the mines I concluded best to put him off until you went up there and satisfied yourself. He has since made arrangements with some Eastern capitalists to furnish him money to develope his mine, and said he would not sell at present.

Yours truly,
J. W. PENCE.

It appears from the letter of December 10th, 1874, (p. 26,) that this correspondence was commenced by Langdon, who seems to have been induced to it by a talk with a third person, Mr. Watson. He writes to Pence, at Watson's request, to ascertain what arrangements can be made for getting into Pence's Nevada mining business, or buying out the old claimants.

Pence answers by letter dated December 17th, 1874, (p. 26) and it is this letter to which the creation of the agency is attributed by the complaint. By this letter Pence expresses his desire to have Langdon join Watson and himself in the mining business: he informs Langdon that 7,500 shares can be had at the price he, Pence, had paid, and gives that price in dollars and cents, and offers to take one-half cash and the balance in notes.

Some immaterial telegrams passed to and from the parties, (p. 27,) and on December 28th, 1874, Langdon sent to Pence a draft to his order for the stock.

On the 8th of January, 1875, (p. 27) Pence wrote to Langdon acknowledging the receipt of the draft, and in express terms referring to the stock as "*the* 7,500 *shares of stock I sold you.*"

In the same letter was transmitted an account of the sale in which Langdon is debited to Pence for the stock, and credited with the proceeds of the draft, and receipted to therefor. All this in the names of the parties. This correspondence refers (as to the matter of agency) to no extraneous facts; it shows "the entire course of dealing between the parties."

II.

By the letter of January 8th, 1875, and by the account and receipt rendered therewith, Pence distinctly notified Langdon that he had sold him 7,500 shares of Pence's stock (p. 27).

All these papers were received by Langdon by due course of mail, and were read by him and Shepard and Linton when received (*p.* 30, *fol.* 69).

The parties all rested in entire acquiescence until June following.

The acquiescence bars the right of rescission. The intention to rescind should have been promptly communicated. No such intention was intimated until the June following, after Langdon had inspected the mine (p. 31). It can be fairly inferred that dissatisfaction with the yield of the mine was the *reason*, and Pence's agency merely the *pretext* for the notice of rescission.

Such a notice must follow promptly knowledge or notice of the existence of the facts which will justify it. In a case like this such a right cannot be held latent for months while those interested with the person who attempts to exercise it are expending money in opening and working the mine.

Manahan vs. Noyes, 52 *N. H.*, 232. *Hall vs. Fullerton*, 69 *Ill.*, 448. *Oakes vs. Turquand, Law Rep.*, 2 *H. of L.*, 325. *Williams vs. Ketchum*, 21 *Wis.*, 232. *Fratt vs. Fiske*, 17 *Cal.*, 380. *Barfield vs. Price*, 40 *Cal.*, 535. *Shaw vs. Barnhart*, 17 *Ind.*, 183. *Fisher vs. Wilson*, 18 *Ind.*, 133. *Cook vs. Gilman*, 34 *N. H.*, 556. *Desha vs. Robinson*, 17 *Ark.*, 228. *Lawrence vs. Dale*, 3 *Johns. Ch.*, 23. *Gates vs. Bliss*, 43 *Vt.*, 299.

III

Knowledge of facts, such as those communicated by the letter of January 8, 1875, and by the papers which accompanied it, irresistibly suggested inquiry, and was sufficient to require Langdon to rescind promptly, and imposed the same duty as actual notice.

The court erred in instructing the jury (p. 32 fol. 63) that "Before the plaintiff was required to affirm or rescind the contract, he must be shown to have had actual knowledge of the imposture practiced upon him. It is not enough to show that he might have known or suspected it from data within his

reach. If the jury believed that the plaintiff had no actual knowledge or belief that this defendant had put his own stock upon them until June 1875, at the mine, then his repudiation of the transaction, if made then was sufficent."

Wilson vs. Wall, 6 *Wallace*, 83. *The Ploughboy*, 1 *Gall*, 41. *Carr vs. Hilton*, 1 *Curt., C. C.*, 390. *Hinde vs. Vattier*, 1 *McL.*, 110. *Booth vs. Barnum*, 9 *Conn.*, 286. *Farwell vs. Smith*, 12 *Pick.*, 87. *Hobart vs. Hilliard*, 11 *Pick*, 144. *Blaisdell vs. Stearns*, 16 *Vt.*, 179. *Stafford vs. Ballou*, 17 *Vt.*, 329. *Petters vs. Goodrich*, 3 *Conn.*, 146.

We have maintained in a previous proposition that the letter and papers which it appears Langdon and his associates received and read in January, 1875, were explicit notice that Pence had sold him his stock. If they shall be held, however, to fall short of this, "the circumstances are such as enable this court to say not only that he *might have acquired* knowledge, but also that he ought to have acquired it but for his gross negligence of the business in question." *Sugden on Vendors, quoted by Grier J. Wilson vs. Wall*, 6 *Wallace*, 91.

But Langdon remained acquiescent until June. The mine was being worked. He had consented to a reorganizntion of the company, and had become a trustee therein. Letters of February 10, and Mareh 15, 1875. So far from expressing any dissatisfaction, Langdon, in his letter to Pence, dated March 15, 1875, writes (p. 29) "I see that you have reorganized, and hope we shall be able to go ahead and make the mine pay. I will go out when I hear from you, and Shepard will go with me. Shepard and Linton have taken that stock with me, and if things look well want more. * * I wish to make our company a strong one."

IV.

Langdon should have placed Pence in *statu quo* by either tendering back the stock or an assignment of the right to the stock which the transaction had vested in him.

The complaint contains no averment that this was ever done. It states that no certificates were ever delivered. But in the letter of Jany. 8, 1875, Pence informs Langdon "the stock I have deposited with the Nat. Gold and Trust Co. of this city."

Whether a formal transfer or delivery had been made is immaterial. The letter of Jany. 8, 1875, the account of sale and the receipt vested in Langdon a proprietary equity to this stock, and Pence was not in *statu quo* until reinvestiture had been made or tendered to him.

But aside from these considerations, Langdon had so conducted that he could not place Pence in *statu quo*. He had accepted the transaction. He had acquiesced in it after he knew precisely what it was. He had acquiesced in a reorganization of the company; had encouraged his associates to go ahead and make the mine pay; had promised to go out and see it when notified; had expressed his desire to make the company a strong one. (Letter, March 15, 1875, p. 29.)— The mine was worked, and in June 1875, he did visit it to inspect its workings, and then for the first time expressed dissatisfaction. (p. 31.) His attempted rescission was too late. Andrews vs Hensler 6. Wallace 254, 258

Garland vs. Bowling, 1 *Hempst*, 17. *Ryan vs. Neilson*, 3 *Iowa*, 310. *Shaeffer vs. Sleade*, 7 *Blackf*, 178. *Stewart vs. Ludwick*, 29 *Ind.*, 230. *Bennett vs. Stanton*, 2 *Ala.*, 181.— *California St. Nav. Co. vs. Wright*, 8 *Cal.*, 585. *Jennings vs. Gage*, 13 *Ill.*, 610. *Tisdale vs. Buckman*, 33 *Me.*, 461. *Cocke vs. Rucks*, 34 *Miss.*, 105. *Evans vs. Gale*, 17 *N. H.*, 573. *Chance vs. The Com's.*, 7 *Blackf.*, 441. *Petters vs. Roberts*, 6 *Ala.*, 811. *Buell vs. Tate*, 8 *Blackf.*, 55. *Calhoun vs. Davis*, 2 *Ind.*, 532. *Teter vs. Hinders*, 19 *Ind.*, 93. *Griffith vs. The Bank*, 9 *Gill. & J.*, 424. *Comer vs. Henderson*, 15 *Mass.* 319. *Masson vs. Boset*, 1 *Denio*, 69. *Brown vs. Witter*, 10 *Ohio*, 142. *Hammond vs. Buckmaster*, 22 *Vt.*, 375. *Moore vs. Barr*, 11 *Iowa*, 198. *Potter vs. Titcomb*, 22 *Me.*, 400.

VI.

Notice of rescission was necessary. *Beeteem's Adminis. vs. Berkholder* 69 *Pa. St* 249, *and cases cited.*

This notice was given on Sunday, (*p.* 31.) This court erred in refusing to charge (*p.* 31,) that such notice of the rescission was made on Sunday and was void. But one notice of rescission was ever given. (Complaint fol. 14 p 6.)

Chesapeake vs. Ohio Canal Co., vs Bradley, 4 *Gr. C.C.* 193. *Morehouse vs. Roberts*, 8 *East*, 547. *Rex. vs. Croke*, *Cowp.* 26. *Benedict vs. Batchelder*, 24 *Mich.*, 425.

It is held in this case that a rescission made on Sunday of a contract is void.

C. K. DAVIS,
Of Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1878.

No. 194.

JOHN W. PENCE, *Plaintiff in Error,*

vs.

ROBERT B. LANGDON, *Defendant in Error.*

In Error to the Circuit Court of the United States for the District of Minnesota.

BRIEF OF DEFENDANT IN ERROR.

WM. LOCHREN,
Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

No. 194.

October Term, 1878.

JOHN W, PENCE, Plaintiff in Error,

vs.

ROBERT B. LANGDON, Defendant in Error.

STATEMENT OF CASE.

The statement of case in brief of counsel for the plaintiff in error is so nearly correct that we shall not re-state it, or do more than call attention to some omissions in that statement.

The complaint asks for *interest* on the principal sum sought to be recovered, $9,425.29, from Dec. 28, 1874, when the gold draft for $8,368.75 was purchased by Langdon and sent to Pence. *Record, at top of page 7.*

The answer of Pence admits that said gold draft for $8,368.75 was worth $9,425.29 in currency. *Record, page 16, fol. 35.* The answer, while in terms denying the agency of Pence, and false representations by him, sets forth the most of the correspondence from which these matters appear, *Record, page 12, et seq.* It also contains the inconsistent allegation that Pence, "in all he did in or "about said transaction to aid said plaintiff, as aforesaid, he acted "gratuitously, at plaintiff's request, and only for his accommoda- "tion. *Record, top of page 16, fol. 33.*

The answer also contains an admission that none of the shares or certificates of stock were ever endorsed, assigned or otherwise

transferred from Pence to Langdon, and that the same remained under the control of Pence. *Record, pp. 16, 17, fols. 35, 36.*

Under the rules of the Circuit Court of this District, adopting the Minnesota code of practice in actions at law, allegations of new matter in an answer stand as controverted without a reply or further pleading.

From the bill of exceptions, *Record, p. 26, et seq.*, it appears that the questions involved were:

First. Whether the letters and telegrams introduced by the plaintiff (below) were sufficient to establish the *agency* of Pence in the purchase of the stock, or were sufficient, in view of the situation, circumstances and relations of the parties, to be submitted to the jury as evidence tending to prove such agency. *Record, pp. 26 to 30.*

Second. Whether the evidence introduced by the plaintiff as to his rescission of the purchase, in June, 1875, at the mine in Nevada, was sufficient to go to the jury on that point. *Record, p. 31.*

The first of these questions was raised upon the objection made by counsel for Pence, to the introduction of further testimony after the proof of agency was all in. *Record, p. 30, fol. 69.*

And both questions were raised by the defendant's requests for instructions to the jury—*Record, p. 30, fols. 70, 71,* and by defendant's exceptions to instructions given. *Record, fols. 71, 73.*

ARGUMENT.

I.

The Circuit Court did not err in holding that the letters and telegrams introduced in evidence by the plaintiff, were evidence tending to show that Pence assumed to act as the agent of Langdon in the purchase of the mining stock.

Let us examine this correspondence, and the facts and circumstances which tend to throw light upon it.

First in order, is the letter from Langdon to Pence—*Record, p. 26*—as follows:

MINNEAPOLIS, MINN., Dec. 10, 1874.

J. W. Pence, Esq., San Francisco, California:

DEAR SIR—I have had a talk with Mr. Watson about your Nevada mining business, and it looks to me all right. He wishes me to write you and see what arrangements could be made about getting into, or buying out the old claimants. If anything can be done that will be satisfactory to all parties, let me know. Money close, as usual.

Yours truly,

R. B. LANGDON.

The answer of the defendant Pence, to the complaint in this action—*Record, p. 11, fol. 24*—gives us some insight respecting the situation of the parties at the time this letter was written, and enables us, as it did the jury, to form a correct judgment as to what was understood by the writer and the person receiving it.

The answer in this action shows that the Owyhee Water and Gravel Mining Company was a corporation, and that its stock consisted of 60,000 shares; and that in July, 1874, Pence and one M. A. Baldwin, bought one-half of the stock—30,000 shares—of one P. N. Mayon: Pence buying 22,500 shares, and Baldwin 7,500 and that in November, 1874, Pence sold Watson 7,500 shares.

This letter of Dec. 10, 1874, advised Pence that Langdon had talked the matter over with Watson. From that fact, and the inquiry respecting the interest of the old claimants, Pence would understand that Langdon was probably informed that Pence, Baldwin and Watson held one-half of the stock, and that the rest was owned by others, all or a part of whom were referred to as "old claimants." The inquiry in the letter was therefore plain. It was not whether Pence would sell, but as to what arrangements could be made for buying from the other parties.

And the fact that Pence so understood the letter is clearly shown by his answer to the same. *Record, p. 26.*

SAN FRANCISCO, Dec. 17th, 1874.

R. B. Langdon, Esq., Minneapolis, Minn:

DEAR SIR—Your letter of the 10th inst. I received this morning. I was glad to hear from you, and would like to have you join Mr. Watson and myself in gold mining. In answer to your question, I will say that there is an eighth (that is 7,500 shares) that *can be bought if taken at once*, at the same I paid and the same that Watson paid, after looking over and prospecting five weeks, The price is $8,125, and interest on same 4 mo., $243.75; total per cash payment, $8,368.75 gold; and then we have to pay $3,125.00 out of the first net proceeds from mine; that is, after we pay about $20,000 for expenses, then we pay as above. The work done on ditch, pipe and improvements amounts to $20,000, but I think we can pay that in one month's work, or less. *Should you conclude to buy this stock, you must telegraph me here on receipt of this letter;* then you can pay in New York exchange by adding the price of gold to the amount of above cash payment. Or you can send me half or more of the cash, as convenient, and a note at sixty days, payable here, for the balance of cash payment, at 12 per cent. interest in gold for interest, *and I can fix it.*

The $3,125, requires no note but a contract to pay, or due bill payable when made out of dividends, without interest. *There are several persons after this stock, but I have the refusal for ten days. If money was a little easier I would take it all;* but then I am satisfied I will get all I will want any way, as old miners all say we have a good mine, and must pay immensely. Then there is

other mines that we can take in when we get a good start. This will put you on the ground floor with us, or better than I am, as I have spent about $600 to find this mine, prospect it, and have title looked up, &c., &c. Our title is O. K. Hoping to hear from you soon, I am

Yours respectfully,

J. W. PENCE.

There can be no doubt as to the purport of this letter. It was an offer on the part of Pence to act as the agent of Langdon, in purchasing for Langdon 7,500 shares of this stock, which is therein represented to be owned by some other person. For Pence says that he himself has the *refusal* (i. e. the option to purchase) this stock, for ten days, and that he would take it himself if money was a little easier. He strongly recommends it as a desirable investment, and also impresses Langdon with the fact that if he would have the stock at all he must act promptly and upon Pence's representations, without waiting for further inquiry or negotiation. "*There are several persons after this stock,*" and Pence has the refusal of it only for ten days, which would leave but short time after Pence's letter would reach Langdon in Minnesota. "Should you conclude to buy this stock you must telegraph me here on receipt of this letter." And then Pence offers to arrange the matter for him.

There is nothing in the letter from which any one could infer that Pence himself could possibly be the owner of the stock, or at all interested in the sale of it. On the contrary, he holds himself out as only interested in helping his friend Langdon to secure a very advantageous investment; giving to his friend his disinterested advice, based on his knowledge of the property, and offering in an equally disinterested manner, to take trouble, and perhaps to temporarily assume responsibility about it.

Upon receipt of this letter, Langdon answered by telegraph as follows:

SAINT PAUL, Dec. 26, 1874.

To J. W. Pence:

Will take it, and send draft at once, *if it gives our party control of the mines.* Answer. R. B. LANGDON.

This was on the 26th of December. Pence's ten days option from the date of his letter, the 17th, would have but one day further to run, and Langdon saw he must act promptly. But before purchasing he wanted to be certain that he was not mistaken as to how much stock was already owned by Pence, and the men he was acting with, Baldwin and Watson; and whether this purchase, in

addition, would certainly give "our party" a majority of the whole stock.

This telegram is further important as showing certainly that Langdon understood that the stock he was about purchasing, was not being purchased from Pence, because such a purchase would not affect the amount of stock held by "our party" one way or the other. The telegram would also authorize Pence to conclude the purchase of the stock for Langdon, if it gave to "our party" a controlling interest in the mine.

This telegram was answered by Pence the same day as follows:

SAN FRANCISCO, CAL., December 26, 1874.

R. B. Langdon, Minneapolis, Minn.

Send draft. We have controlling stock interest; that means business.

J. W. PENCE.

The inference from this telegram is that Pence has acted on Langdons' telegram. and secured the stock for him. This is implied from the direction to "send draft" with which to pay for it. Also, that by that purchase at least, "our party" has controlling interest in the stock, and that having secured such contract the business of the enterprise will be pushed.

On December 28th, Langdon telegraphed Pence that he had forwarded the draft, and wrote him on the same day enclosing the draft for $8,368.75 in gold.

This is all the correspondence up to the forwarding of draft by Langdon to Pence to pay for the stock, and there can be no doubt upon the face of this correspondence that Pence represented that he was acting as the agent of Langdon, in purchasing for Langdon this stock from some other person, whose name was not mentioned, and that Langdon so understood the transaction. There was not only nothing to cause any suspicion that Pence was unloading his own stock on Langdon, but Pence had plainly represented that he had no purpose of parting with any of the stock of this mine which he owned, by his statement that he would himself have bought *this stock* which Langdon got, had money been a little easier, and showing that he had been considering whether he should buy it; *having secured the refusal of it for ten days.*

This was the whole correspondence up to and including the purchase of the stock; and as the answer of Pence in this action admits that the stock sold to Langdon belonged to Pence, it follows that Pence under the pretence of acting as Langdon's agent, in buying

for him stock from another party, secretly and fraudulently made a sale of his own stock to Langdon.

Then followed the letter from Pence to Langdon, of January 8, 1875, enclosing a statement of account of the transaction. (*Record, p. 27, fol. 62,*)

SAN FRANCISCO, January 8, 1875.

Hon. R. B. Langdon, Minneapolis, Minn.:

DEAR SIR: Your letter of Dec. 28th, 1874, I received, containing a sight gold draft on Nat. Park Bank, N. Y., for 8,368.75 dollars, which your account has credit for, and enclosed please find bill and receipt. There have been not less than ½ doz. after the 7.500 shares of stock I sold you, and all seem astonished to find themselves too late, and still more astonished when I told them there is no more to be had at present, as we have the controlling interest, and propose to run the mine as we think best."

The letter proceeds at some length respecting the general mining prespects of the country, and expenditures past and prospective about this mine; and has a statement that the stock is deposited by Pence in the Nat. Gold Bank and Trust Company, and matters touching the prospective value of the mine.

The letter is accompanied by statement of account as follows: *Record page 28.*

SAN FRANCISCO, Cal., Jan. 8th, 1875.

Hon. R. B. Langdon, Minneapolis, Minn., to J. W. Pence, Dr.:

To 7,500 shares of stock in Owyhee Water and Gravel Mining Co., Elko county, Nevada, at one hundred and fifty dollars per share.....	$11,250 00
Interest on $8,125, 4 months.....	243 75
	$11,493 75
Cr. by cash gold draft, N. Y.....	$8,368 75
Bal. due out of first net proceeds.....	$3,125 00

On the back of the above was written the following:

Rec'd of R. B. Langdon, Esq., on the within bill, eight thousand three hundred sixty-eight 75-100 dollars in sight draft on Nat. Park Bank, New York, payable in gold coin.

$8,368.75. J. W. PENCE.

The other letters introduced, have no special bearing except that they show that during the winter and spring of 1875 Pence remained at San Francisco, and that Langdon was attending to his duties as a member of the Minnesota legislature, that Pence continued to laud the mine and at the end of his last letter threw out

an adroit suggestion to induce Langdon to make a further purchase of stock.

As we have before said, the correspondence up to and including the sending of the money by Langdon shows clearly that Pence was ostensibly acting as the agent of Langdon for the purchase of stock for Langdon from another person, and that Langdon must have so understood it, and that Pence must have intended that Langdon should so understand it.

We might have rested on that evidence upon the question of agency, and had nothing further been put in by either party it would have been the duty of the court on the face of the correspondence to have charged the jury that they must find on that issue in favor of Langdon. The letter of January 8th, 1875, and its enclosure was however in our possession; it had been pleaded by the defendant, and as it must come into the case might as well be put in by us so that the court and jury should have the whole case, fairly and at once.

The letter of January 8, 1875, and enclosed account therewith sent, taken in connection with the previous letters and telegrams between the parties did *not show* that it was the understood transaction between the parties, during the negotiation and completion of the purchase, that Pence was selling his own stock to Langdon,

Nor did it, when considered (as it must be) in connection with the previous correspondence between the parties, operate as notice to Langdon, that the stock he had purchased was Pence's own stock.

First—Langdon before and on the receipt of it must have been fully convinced that Pence had acted merely as his friendly agent in buying the stock from another, and would view the papers with his mind pre-occupied with that idea, as an undoubted fact.

Second—There was nothing in the statement of account inconsistent with that. It was a mere account furnished by the agent of the receipt and application of money in the purchase of stock, where the name of the seller of the stock was undisclosed, and apparently immaterial.

Third—The words: "stock I sold you" in the letter, in the connection in which they occur, would be unlikely to attract attention. The whole statement "there have been not less than one-half dozen after the 7,500 shares of stock I sold you, and all were astonished to find themselves too late, and still more astonished when I told them there is no more to be had at present as we have the controlling interest and propose to run the mine as we think best," would be read together, and not scanned and weighed in parts of sentences,

and the idea that would be caught from this statement would not be that it was made with any purpose of informing Langdon from what person the stock was bought; but only of the fact that the stock was eagerly sought after; with the *inferential* addition that *by this purchase* the friends had got a controlling interest in the mine, placing them in a more advantageous position than before such purchase, and that Pence was determined to hold this advantageous position. This statement by Pence, that he informed these persons, who were eager to purchase, that his party had the controlling interest and proposed to run the mine, is presented as a changed condition of things—changed by this purchase of Langdon. It is inconsistant with the idea that Pence owned the stock before, and agrees and harmonizes with all his previous representations that the stock was to be bought of another, and especially with his telegraphic answer of Dec. 26th, 1874, to Langdon's telegram of that date, to the effect that this purchase gave a controlling interest. Therefore, even if the words—"Stock I sold you," had arrested the attention of Langdon, as was unlikely, he would most naturally dismiss it from his mind as a mere slip of the pen, or inaccuracy of expression, not to be considered, in view of the plain and unmistakable previous representations of Pence, that the stock was purchased of another, confirmed by the inferential representation *contained in the same sentence*, that this purchase had wrought a change in the condition of Pence's party, giving them the controlling interest in the mine.

Such an inaccuracy of expression might easily happen in view of the fact that Pence was ostensibly buying the stock from a person whom Langdon did not know, and had no apparent interest in knowing; and that he presumably had purchased it for Langdon upon an option, or refusal, which he had secured for himself, and in the face of eager competition and whether under such circumstances he had negotiated with the vendor in Langdon's name, or had taken it nominally in his own name on that option, and at once turned it over to Langdon, were matters which Langdon could not know. Inaccuracies of expression are not uncommon,—certainly not in Pence's correspondence. The statement of account which was enclosed in this very letter contained one which was still more glaring. Therein, the price for the 7,500 shares of stock is stated to be "*One hundred and fifty dollars per share*"—(not in figures, but *written out in full*), whereas, the aggregate price, for the whole, as stated in the same account, and in the previous correspondence, shows that the price per share was but *one dollar and fifty cents.*

Now in order to hold that the expression referred to, in the sentence and in the connection in which it appears, was *notice* to Langdon, that the stock purchased was owned by Pence during the whole negotiation, the court must hold that the language used was so plain, direct and unmistakeable a statement of such fact, that Langdon could not reasonable understand it otherwise, or regard it as an inaccuracy, like the accompanying statement of the price of the shares, and that he was therefore bound to *believe and take notice* that all of Pence's representations as to the ownership of the stock, and as to his acting in Langdon's interest in the purchase, were false and fraudulent; and that this man whom he believed to be not only friendly but honest, as his trust in Pence shows, was a deceitful scoundrel.

Mankind is not so bad, that any rule of law requires that one shall, *at his peril*, convict another, in whose honesty he believes and trusts,—of perfidy and dishonesty, upon such evidence as that. If Pence, after having assumed to act as Langdon's agent in the purchase of stock had desired to sell his own stock to Langdon he should have appraised Langdon of that fact IN PLAIN TERMS. He cannot complain that Langdon was unsuspicious, and not easily brought to doubt his honesty.

The matter was properly left to the jury.

The only doubt, as to the correctness of the instructions of the court, is as to whether it ought not as a matter of law to have instructed the jury that the written evidence showed conclusively that Pence assumed to act as Langdon's agent in buying the stock. But where the court leaves the construction of writings to the jury, if they construe them correctly the error is without prejudice and becomes immaterial. *Martineau vs Steele, 14, Wis., 272.*

And if the circumstances, or situation of parties, are to be considered as throwing light on their correspondence the matter must be left to the jury.

II.

The rule of law that an agent employed to purchase cannot himself be the seller, or if employed to sell cannot himself be the buyer, rests on the most obvious principles of justice and sound policy. The temptation to betray the principal where the agent's *own interest* comes in play, is so great that the law will always set aside the transaction without any inquiry into the question whether

there was actual fraud or not. This is so well settled that we shall cite but few of the numerous authorities: *Wormley vs. Wormley, 8 Wheat, 421, 441; Michond vs. Girod, 4 How, 503, 554; Conkey vs. Bond, 36 N. Y., 427; Davoue vs. Fanning, 2 John, Ch. 251; Gillett vs. Peppercorne, 3 Beav., 78; Brookman vs. Rothschild, 3 Simons, 154; Benson vs. Heathorn, 1, Yo. & Coll., 326, 339; Story on Agency, §§ 9, 210, 211; Dunlap's Paley's Agency 33, and note and cases cited.*

III.

The court did not err in instructing the jury (p. 32, fol. 73.) "Before the plaintiff was required to affirm or rescind the contract, he must be shown to have had actual knowledge of the imposition practiced upon him. It is not enough to show that he might have known or suspected it from data within his reach:" Nor in the following instruction: "If the jury believe that the plaintiff had no actual knowledge or belief that defendant had put his own stock upon them, until June, 1875, at the mine, then his repudiation of the transaction, if made then, was sufficient."

The instructon was relevant to testimony introduced that plaintiff did not know that the stock sold him was Pence's stock until the visit to the mine. (p. 31, fol. 70.)

The law applicable to the case is thus stated by Judge Story. *Story on Agency*, § *210.*

"Of course, it is to be understood, as a proper qualification of the doctrine that the principal has *an election* to adopt the act of the agent or not; and that if *after a full knowledge of all the circumstances* he deliberately and freely ratifies the act of the agent, or acquiesces in it for a great length of time, it will become obligatory upon him; not by its own inherent force, but from the consideration that he thereby waives the protection intended by the law for his own interests, and deals with his agent as a person *quoad hoc.* discharged of his agency."

The case of *Gillett vs. Peppercorne* 3, *Beavan 78*, (*43 Eng. Ch. Rep.*) *78*, illustrates the same rule, that the principal has his election after he has *actual knowledge* of the nature of the transaction, and is not cut off by the fact that means of learning it sooner were within his reach. There the plaintiff, at divers times, from 1826 to 1831, had employed the defendant to buy for him stock in the Vauxhall Water Works Company, and in each instance the defend-

ant, ostensibly acting as his agent to buy, had sold his own stock which he had nominally placed in the hands of other persons, from whom the sales appeared to be made. The plaintiff did not discover the fraud until 1837, although the books of the company, which were open to his inspection as a proprietor, would have shown it. The Master of the Rolls (Lord Langdale) says, at page 85 :

> "It is not sufficient to say that the plaintiff, being a proprietor, might have gone to the books and made a search and found out all these matters, or that the son, being a director, and having the books before him, might have made this search; *the knowledge, in my opinion, ought to have been brought home to the plaintiff*, and this has not been done."

The doctrine of *constructive* notice, from circumstances which would put a prudent person upon inquiry, is an equitable doctrine, invoked to prevent fraud, and to protect innocent purchasers, and will affect a case where one of two innocent persons must bear a loss, by placing it on the one who has been guilty of laches or lack of diligence. But we submit, that the rule is always invoked as a shield to the innocent, and never as a weapon to enable one to consummate a fraud, nor to secure him in the enjoyment of the fruits of a fraudulent transaction.

That the doctrine of constructive notice is entirely equitable, and varies according to the equities of each case is shown by the leading case cited in the brief of plaintiff in error, *Wilson vs. Wall, 6, Wallace 83*, which holds that where it is sought to affect a *bona fide* purchaser for value with constructive notice, the question is not whether he had the means of obtaining and might by prudent caution have obtained the knowledge in question, but *whether his not obtaining it was an act of gross and culpable negligence.* And in that case there was no fraud affecting the parties claiming adverse to the purchaser.

The fact that Langdon made no objection to the election of himself as trustee, has no bearing; for at that time he knew nothing of the fraud which had been perpetrated against him. And it does not appear that he ever did any act as trustee.

IV.

There is nothing in the 4th point of plaintiff in error — that "Langdon should have placed Pence in *Statu quo* by either tendering back the stock, or an assignment of the right to the stock

which the transaction had vested in him" — for the simple reason that the case shows that no stock had even been assigned or transferred to Langdon.

Pence, in his answer to plaintiff's complaint, "alleges the fact to be that *at the time of said sale* of said shares to plaintiff, the certificates of said stock, *together with other certificates* of stock in said mining company *were deposited* in the National Gold Bank and Trust Company, of said San Francisco, for safe keeping and the protection of all persons interested therein, of which said plaintiff had due notice, as alleged in his said complaint, *and that they have ever since then remained* as plaintiff has at all times well known; *that although no formal endorsement of transfer of said shares has been made upon said certificates by said defendant*; he, defendant has, as plaintiff has at all times well known, always been ready and willing to make such endorsement or to do any or all things requisite and necessary to formally transfer the said shares, and has, before the commencement of this action, offered so to do, and *still is able*, ready and willing and hereby offers so to do." *Record, p. 16, fols. 35, 36.*

It is apparent therefore, that the shares remained in Pence's possession and control, unassigned, and not even designated or separated from the rest of his stock; and that Langdon never had possession of, or title to any specific shares. *They remained in Statu quo.* The statement of account transferred no shares.

The last clause of the plaintiff in error's 4th point, that Langdon had acquiesced so long after the sale that he could not rescind, has already been considered. He was not bound to rescind until he obtained knowledge of the fraud. *When* he obtained that knowledge was a question of fact for the jury; and as there was direct evidence that he had no knowledge of the fraud until June, 1875, the finding of the jury is conclusive.

V.

The remaining point made by the plaintiff in error is that the notice of rescission given by Langdon to Pence at the mines, when he discovered the fraud, was insufficient because given on Sunday.

In the first place, no particular form of notice was necessary. Any communication to Pence which should cause Pence to understand that Langdon rescinded the sale, was enough. The notice, plain and distinct, was given on Sunday, which was as soon as

Langdon was apprized of the facts (p. 31, fol. 70). And there was in evidence no other direct or formal notice; but there was evidence of subsequent conversations and statements of the parties relative to it, which are mentioned, but not set out in the bill of exceptions (p. 36, fol. 71). Now these subsequent conversations not appearing inconsistent with the first notice given, may well be held to be renewals of that notice on other days.

But contracts and notices on Sunday are valid, except where they are forbidden by statute.

Drury vs. Defontaine 1, Taunton 130; Rex vs. Brotherton 2 Str. 702; Fennell vs. Ridler, 5, B. & C. 406; Rex vs. inhabitants of Whitnash 7, B. & C. 596; Adams vs. Gay, 18 Vt. 358; Allen vs-Gardner 7, R. I. 22. Woodman vs. Hubbard 5, Foster, 67. Nason vs. Dinsmore 34, Me. 391. Shank vs. Shoemaker 18. N. Y. 489, 490. Boynton vs. Page 13, Wend 425. Story vs. Elliot 8, Cowen 28.

There was no evidence in the case of the existence of any statute of Nevada, in respect to contracts or secular business on Sunday.

The cases cited by plaintiff in error on this point, have no bearing. *Rex vs. Croke, Cowp 26.* does not touch the matter, *Roberts vs. Monkhouse 8 East, 547.* decided that notice of plea filed, served on Sunday, was irregular and within the statute of 29, Charles II, c. 7, *S.* 6, forbidding judicial proceedings, and service of papers in the nature of process on Sunday. *Chesapeake & Ohio Canal Co., vs. Bradley 4, Cr. C. C. 193,* held that the service of a notice of motion in the action, on Sunday, was irregular, on the authority of the case just cited; doubtless considering so old an English statute regulating court proceedings, as part of the commen law here.

In the case of *Benedict vs. Bachelder 24, Mich. 425* the parties had exchanged horses and Bachelder claiming to have been defrauded took steps on Sunday to rescind the contract, and did sufficient to have effected that result on another day. But the court held that it involved a matter of business which could not be lawfully performed on Sunday.

The Michigan statute under which that decision was made was as follows:

"No person shall keep open his shop, warehouse or workhouse, *or shall do any manner of labor, business or work*, except only works of necessity or charity, or be present at any dancing, or at any public diversion, show or entertainment, or take part in any sport, game or play on the first day of the week; and every person so offending shall be punished by a fine not exceeding ten dollars for each offence."

Mich. Rev. Statutes of 1846, Chap. 43, Sec. 1; Vol. 1, Compiled Laws of Michigan, revision of 1857, p. 499, Sec. 1; Vol. 1, Compiled Laws of Michigan, revision of 1871, p. 650, Sec. 1.

VI.

We claim that the exceptions in this case are manifestly frivolous, that the writ of error was taken for delay, and that it is a proper case for the application of subdivision 2 of Rule 23 of this court, and that damages under that rule, in addition to interest, should be awarded in the amount of the judgment.

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